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Supreme Court, U.S.
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No. 001457

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In the Supreme Court

OF THE

United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,
Petitioner,

v.

LIONEL SIMON, DBA LIBERTY PAPER COMPANY,
Respondent.

On Petition For a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(i) Whether an award of punitive damages which is 340 times greater than the attendant award of compensatory damages ($1,700,000.00: $5,000.00) is violative of a defendant's right to due process under the Fourteenth Amendment to the United States Constitution, especially where the conduct involves a single commercial transaction and the harm suffered is purely economic.

(ii) Whether the standard of review on a challenge to the constitutionality of a punitive damage award is (a) "independent and de novo," or (b) only an "abuse of discretion."

(iii) In determining the reasonableness of the relationship between an award of punitive damages and the plaintiff's actual harm, whether it is proper to consider claims for compensatory damages which have previously been rejected.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are LIONEL SIMON, doing business as LIBERTY PAPER COMPANY, the Plaintiff in the underlying action, and Defendant SAN PAOLO U.S. HOLDING CO., INC., the Petitioner herein. SAN PAOLO U.S. HOLDING CO., INC., is a corporation formed and existing under me laws of the State of Delaware, and is a subsidiary of SANPAOLO IMI S.p.A., a corporation organized under the laws of the Republic of Italy. Also a party to this litigation (but not this Petition) is Defendant SAN PAOLO BANK (formally known as Istituto Bancario San Paolo Di Torino), an affiliate of SAN PAOLO U.S. HOLDING CO., INC.

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SAN PAOLO U.S. HOLDING CO., INC. ("SAN PAOLO") respectfully petitions for a Writ of Certiorari to review the Order of the California Supreme Court in this case.

OPINIONS BELOW

The decision of the California Court of Appeal affirming the judgment of the Superior Court of Los Angeles County (App., *infra,* A-15 – A-49) is unreported. The denial of the Petition for Rehearing by the California Court of Appeal (App., *infra,* A-51) is unreported. The denial of the Petition for Review by the California Supreme Court (App., *infra,* A-55) is unreported.

JURISDICTION

On August 28, 2000, the California Court of Appeal, Second Appellate District, Division Four, filed its unpublished Opinion. On September 21, 2000, the Court of Appeal denied a timely Petition for Rehearing filed by SAN PAOLO. On December 13, 2000, the California Supreme Court, *en banc,* issued its Order denying SAN PAOLO'S Petition for Review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment, Section 1, of the United States Constitution provides in relevant part:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

A. Factual Background

This lawsuit has its genesis in the failed efforts of LIONEL SIMON dba LIBERTY PAPER COMPANY ("SIMON") to purchase real property containing a commercial office building (the "Property"), from SAN PAOLO U.S. HOLDING COMPANY, INC. ("SAN PAOLO"). The Property was first acquired by SAN PAOLO on January 17, 1996, through a foreclosure sale. (Reporter's Transcript ["R.T."], p. 1469, l. 19-20[1]) Shortly thereafter, SIMON made his first inquiry relating to the purchase of the Property. Throughout the next six months, the parties engaged in three different sets of negotiations relating to SIMON'S attempts to purchase the Property. Ultimately, those efforts failed, and the Property was sold by SAN PAOLO to a third party in August, 1996. (R.T., p. 1596, l. 14-21; Joint Appendix in Lieu of Clerk's Transcript ["App."], Vol. III, p. 1901-1908; p. 1925.)

In total, SIMON engaged in three different unsuccessful sets of negotiations for the purchase of the Property. (R.T.,

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[1] The Joint Appendix in Lieu of Clerk's Transcript and the Reporter's Transcripts referenced herein are part of the record on appeal below.

p. 1336, l. 20-28; R.T., p. 1472, l. 24-p. 1473, l. 3.) Two sets of negotiations occurred in April, 1996. (R.T., p. 1340, l. 21-26; p. 1473, l. 5-p. 1474, l. 4.) The third set of negotiations occurred in June, 1996. (App. Vol. VII, pp. 1864-1871; pp. 1899-1900.) The closest that SIMON ever came to purchasing the Property was in June 1996, when the parties prepared a written Letter of Intent. (App. Vol. III, 1864-1871.) Although the Letter of Intent was eventually signed, the transaction ultimately failed, as the parties did not take the following steps contemplated in the Letter of Intent: the execution of a Deposit Receipt and Escrow Instructions and the opening and closing of Escrow.

As the jury recognized, the Letter of Intent clearly provided that it was nonbinding. (R.T., pp. 1475, l. 3-25.) The Letter of Intent contained several conditions which confirmed that it was not a binding agreement, including: (i) approval of San Paolo Bank's Los Angeles and New York offices; (ii) further negotiations between the parties; (iii) preparation of a Deposit Receipt Form (i.e., formal documentation); and (iv) approval by SIMON'S legal counsel. (App. Vol. VII, 1864-1871.)

Immediately after signing the Letter of Intent, SIMON and SAN PAOLO continued to negotiate the terms of the proposed sale of the Property. (App. Vol. VII, pp. 1872-1898.) These negotiations occurred during a period of less than 24 hours. However, the parties still could not reach an agreement on numerous issues. After further unsuccessful negotiations, SAN PAOLO came to believe that SIMON would never purchase the Property. (R.T., p. 1035, l. 28-p. 1636, l. 12; p. 1637, l. 16-21; p. 1639, l. 11-23.) SAN PAOLO therefore canceled the negotiations in writing and sold the Property to a third person for $100,000.00 less than SIMON'S offer. (App. Vol. VII, p. 1899-1900; R.T., p. 1569, l. 14-21.)

After SAN PAOLO agreed to sell the Property to a third party, SIMON filed this lawsuit and recorded a lis pendens against the Property, which was expunged on July 23, 1996. The sale of the Property to the third party closed immediately thereafter. (App. Vol. III, p. 1925.)

B. Procedural Background and Presentation of the Federal Question

On June 21, 1996, SIMON filed his Complaint against SAN PAOLO. (App. Vol. I, pp. 1-18.) The Complaint included causes of action for Breach of Contract, Specific Performance, Breach of the Implied Covenant of Good Faith and Fair Dealing, and False Promise, all founded upon an alleged promise by SAN PAOLO to sell the Property to SIMON.

On April 30, 1997, the trial court granted SAN PAOLO'S Motion for Summary Adjudication of Issues on the causes of action for Specific Performance and Breach of the Implied Covenant of Good Faith and Fair Dealing. (App. Vol. II, pp. 585.)[2] This ruling left only two causes of action remaining against SAN PAOLO: for Breach of Contract and for False Promise.

On August 4, 1997, the case went to trial on the remaining causes of action, and the jury returned a verdict in favor of SAN PAOLO on the cause of action for Breach of Contract, finding that neither the Letter of Intent nor any other document constituted a binding, enforceable agreement between the parties. (App. Vol. III, pp. 613-617.) On the remaining cause of action for False Promise, the jury returned a verdict in favor of SIMON, and awarded

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[2]Co-Defendant San Paolo Bank filed its own Motion for Summary Judgment at this same time. The Motion was granted by the trial court and affirmed on appeal by the California Court of Appeal, 2nd Civil No. B113208 (Opinion filed May 21, 1998).

the sum of $5,000.00 as actual damages. In the punitive damage phase, SIMON was awarded the sum of $2.5 million. (App. Vol. III, pp. 618.)

SAN PAOLO then filed its Motions for (a) Judgment Notwithstanding the Verdict (which the trial court denied); and (b) New Trial or, Alternatively, For Remittitur of Excessive Damages. In these Motions, among other things, SAN PAOLO asserted that the punitive damage award, which was 500 times the award of actual damages, was grossly excessive as a matter of law and violative of SAN PAOLO'S due process rights pursuant to this Court's decision in *BMW of North America v. Gore,* 517 U.S. 559 (1996) and related authorities. (App. Vol. III, pp. 634-635, 646-647; Vol. IV, pp. 1040-1044.) The trial court ruled that it would grant the Motion for New Trial unless SIMON accepted the reduced punitive damage award of $250,000.00. (App. Vol. IV, p. 1050; Vol. V, p. 1228.) SIMON rejected the reduced award and elected to proceed with a new trial.

On March 9, 1998, the new trial went forward on the limited issue of the amount of the punitive damages, if any, to be awarded to SIMON (the "Second Trial"). Although advised of the first jury's findings that: (i) there was no binding and enforceable contract (thus defeating SIMON'S claim for breach of contract); and (ii) the only damages sustained by SIMON on the claim of false promise was the sum of $5,000.00, the second jury returned a verdict in favor of SIMON for punitive damages of $1.7 million. (App. Vol. VII, pp. 1808-1815.)

At the Second Trial, SIMON'S counsel argued that the jury could consider SIMON as having suffered other damages which the first jury previously denied him:[3]

> "But it is harm that was suffered by LIONEL SIMON, nonetheless, and that harm is at least $400,000.00, the difference between the price he had and he should have purchased the property at, $1.1 million, and the price the property is really worth."

(R.T. p. 1915, l. 7-12.)[4]

In addition to the foregoing, SIMON'S counsel made inflammatory statements to the jury which were inappropriate and designed to arise passion and prejudice, such as the following:

1. The punishment has to fit the "crime" (R.T. p. 1918, l. 3);

2. SAN PAOLO was a "criminal" (R.T. p. 1922, l. 18-21; R.T. 1980, l. 9-12);

3. SAN PAOLO'S conduct was nothing less than attempted murder, assault or battery (akin to "shooting a gun into a crowd"). (R.T. p. 1974, l. 17-p. 1975, l. 3);

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[3] At the First Trial, SIMON sought damages for not only the alleged lost value in the Property, but also the consequential damages incurred in retaining an attorney to review the transaction. (R.T. p. 1915, l. 7-12; p. 1916, l. 3-6; p. 1927, l. 15-16.) The first jury specifically awarded SIMON nothing for the alleged lost value in the Property, yet SIMON still argued to the second jury that his lost value in the Property was $400,000.00. (SAN PAOLO'S Motion in Limine on this issue was denied.)

[4] The trial court denied the Motion in Limine of SAN PAOLO which requested that SIMON be prohibited from introducing evidence on claims of damages which had already been rejected. (App. Vol. V, pp. 1323-1334.)

4. "They didn't think anybody would find out. And there would never be a criminal caught if they were all perfect. And this one wasn't." (R.T. p. 1980, 1. 9-12.)

After the verdict in the Second Trial, SAN PAOLO filed a Motion for New Trial, or Alternatively for Remittitur of Excessive Damages. (App. Vol. VI, pp. 1518-1520; Vol. VII, pp. 2010-2029.) Again, SAN PAOLO posited that the award of punitive damages in an amount 340 times the actual damages awarded was excessive as a matter of law and violative of its federal due process rights. (App. Vol. VI, p. 1519; Vol. VII, pp. 2021-2023.) The trial court denied the Motion.

In its perfunctory treatment of SAN PAOLO'S challenge to the excessiveness of the award under the standards set forth in *BMW* and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the court found that an award of punitive damages "boils down to about the same sort of analysis that the jury gives to emotional distress damages. It's not done with any particular precision. And the cases have not required that it be done with particular precision. [¶] I have analyzed it from the standpoint of each of the three tests, and I have concluded that in all the facts in this case and the two trials, the two verdicts and everything that I heard in the case, the Motion is denied." (App., *infra*, A-11; App. Vol. VII, pp. 1826-1828; R.T., p. 1997, 1. 12-p. 1998. 1. 12, 2001, 1.19-p. 2002, 11. 1-12.)

Judgment was then entered on April 8, 1998, finding in favor of SAN PAOLO on the claim of Breach of Contract; finding in favor of SIMON in the amount of $ 5,000.00 on the claim of False Promise; and awarding SIMON punitive damages of $1,700,000.00. (App. Vol. VII, p. 1808-1815.)

On or about April 20, 1998, SAN PAOLO filed its Notice of Appeal with regard to the entry of Judgment in favor of SIMON on the False Promise cause of action, the

amount of the Judgment in favor of SIMON, and the rulings upon which the Judgment was based. (App., Vol. VII, pp. 1829-1834.) Respondent SIMON then filed a Notice of Cross-Appeal as to the first jury verdict regarding the Breach of Contract claim and the trial court's ruling on the (first) Motion for New Trial or, Alternatively, For Remittitur of Excessive Punitive Damages following the first trial. (App., Vol. VII, pp. 1851-1853.) On appeal, SAN PAOLO contended, among other things, that any injury suffered by SIMON was purely economic and that the punitive-to-actual damages ratio of 340 to 1 was constitutionally excessive and disproportionately penalized SAN PAOLO. (Appellant's Opening Brief, pp. 29-34, Appellants' Reply Brief and Cross-Respondent's Brief, pp. 18-21.)

On August 28, 2000, the California Court of Appeal, Second Appellate District, Division Four, filed its unpublished Opinion in this matter, affirming the Judgment in its entirety and rejecting the appeals of SAN PAOLO and SIMON. (App., *infra,* A-15 – A-49.) In sustaining the award of punitive damages, the Court of Appeal employed a deferential "substantial evidence" standard of review, which "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (App., *infra,* A-31, A-35 – A-36, quoting *Crawford v. Southern Pacific Co.,* 3 Cal.2d 427, 429 (1935).) The Court of Appeal prefaced its Opinion with the statement that: "We summarize the evidence in the light most favorable to Simon, as the prevailing party, and we give Simon the benefit of every reasonable inference and resolving conflicts in support of the verdict." (App., *infra,* A-19 – A-20.) Throughout the Opinion, the Court of Appeal acknowledged the highly deferential nature of its review and repeatedly refused to engage in an independent, de novo review of the constitutionality of the punitive damages award.

In analyzing the reasonableness of the relationship of the punitive damages awarded and harm actually suffered, the Court of Appeal also posited that it could consider as a factor the $400,000.00 benefit of the bargain damages sought by SIMON in his claim for breach of contract, which was expressly rejected by the jury. (App., *infra,* A-30.) The Court concluded that, in this light, the ratio of actual harm to punitive damages was "not 340 to 1, but just over 4 to 1," which was "not grossly disproportionate." (App., *infra,* A-31.) The authorities relied upon by the Court, however, did not consider damages for alleged potential harm which were never awarded.

On September 12, 2000, SAN PAOLO filed its Petition for Rehearing with the Court of Appeal, pointing out several omissions and misstatements of material facts and issues presented on appeal. On September 21, 2000, the Petition for Rehearing was denied. (App., *infra,* A-51.) On October 6, 2000, SAN PAOLO filed a Petition for Review with the California Supreme Court, presenting the following issues for review:

> 1. Is an award of punitive damages in a sum 340 times greater than the attendant award of compensatory damages violative of a defendant's right to due process under the Fourteenth Amendment to the United States Constitution or Article 1, Section 7, of the California Constitution, especially where the conduct involves a single transaction and the harm suffered is purely economic?
>
> 2. Is a ratio of 340:1 in punitive damages to compensatory damages ($1,700,000:$5,000.00) presumptively the result of passion and prejudice and therefore excessive as a matter of law, where the conduct involves a single commercial transaction and the harm suffered is purely economic?

3. In determining the reasonableness of the relationship between an award of punitive damages and the plaintiff's actual harm, is it proper to take into account a claim of compensatory damages which has already been adjudicated in favor of the defendant (and against the plaintiff)?

4. Can a defendant be found liable for a false promise following an adjudication by the fact finder that there is no binding and enforceable agreement between the parties?

5. Is there a void in California law regarding the method for determining a plaintiff's actual harm in assessing the reasonableness of an award of punitive damages?

On November 27, 2000, the California Supreme Court extended the time for granting or denying review in this matter to and including January 4, 2001, or the date upon which review was either granted or denied. (App., *infra,* A-53.) On December 13, 2000, the California Supreme Court, *en banc,* issued its Order denying SAN PAOLO'S Petition for Review. (App., *infra,* A-55.)

On December 18, 2000, the Clerk of the Court of Appeal issued a Remittitur. On December 26, 2000, SAN PAOLO filed a Motion for Recall and Stay of Issuance of Remittitur with the Court of Appeal to stay any efforts by SIMON to collect on his Judgment pending the filing of the instant Petition by SAN PAOLO. On January 10, 2001, the Court of Appeal filed its Order recalling the Remittitur and staying its issuance for 90 days and advising that SAN PAOLO could apply to this Court for a further stay. (App., *infra,* A-57 – A-58.)

REASONS FOR GRANTING THE PETITION

A. State Courts Require Guidance Regarding the Standard of Appellate Review of the Constitutional Excessiveness of Punitive Damage Awards.

The subject award of punitive damages presents unsettled, federal questions of law that affect the public at large. The award of punitive damages in this case (a sum 340 times greater than the attendant award of compensatory damages) is but one example of the excessive punitive damage awards by both state and federal court juries in violation of defendants' due process rights under the Fourteenth Amendment which continue to plague the American judicial system. Notwithstanding the fact that this Court has set certain legal guideposts[5] for determining whether an award of punitive damages is grossly excessive, and therefore violative of the due process protections set forth in the Constitution, no clear standard has been set for the review of such an award on appeal.

This Court has already held that the determination of whether a punitive damage award is grossly excessive is of constitutional significance. Due process requires that a person receive "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Id.* at 573, citing *Bordenkircher v. Haves*, 434 U.S. 357, 363 (1978). Further, generally, appellate

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[5]These guideposts include the relative reprehensibility of the defendant's conduct, the relationship between the jury's *actual* compensatory and punitive damage awards, and a comparison of the award to analogous civil and criminal penalties. The Court has also identified other comparative factors, such as whether the tort was purely economic, intentional, and/or repeated. *BMW*, 517 U.S. at 575-584.

court review of constitutional claims based upon the Bill of Rights is conducted de novo. See, e.g., *Haynes v. Washington,* 373 U.S. 503, 515 (1963) (appellate review of Due Process Clause claims is a "duty of constitutional adjudication"). Such independent review is necessary "if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas v. United States,* 517 U.S. 690, 698 (1996). This Court, however, has not firmly established that this standard of review is to be applied by state or federal courts when assessing the constitutional propriety of an award of punitive damages.

In the absence of a clear standard of review from this Court, undue deference can be (and has been) accorded to the discretion of trial courts, thereby inviting divergent development of the law in this arena, leading to conflicting constitutional standards throughout the United States. Notably, when reviewing the propriety of an award of punitive damages, California courts determine if "the entire record viewed most favorably to the judgment indicates the award was rendered as the result of passion and prejudice." *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.,* 155 Cal.App.3d 381, 388 (1984); internal citation omitted; see also *Neal v. Farmers Ins. Exchange,* 21 Cal.3d 910, 927 (1978). This "passion and prejudice" inquiry is a species of the deferential substantial evidence standard of review. *Fortman v. Hemco, Inc.*, 211 Cal.App.3d 241, 259 (1989). This standard conflicts with the de novo standard generally employed by California courts when reviewing constitutional issues. See *State of Ohio v. Barron,* 52 Cal.App.4th 62, 67 (1997).

Other state courts throughout the country have employed divergent appellate standards of review when conducting a constitutional inquiry into claims of grossly excessive

punitive damage awards.[6] The New Mexico Supreme Court has adopted a deferential "substantial evidence" standard similar to that employed by the California courts. See *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 127 N.M. 1, 18, 19, 976 P.2d 1 (1998) ("the amount of [punitive] damages is left to the sound discretion of the jury;" "there was substantial evidence in the record to support the jury's award of punitive damages"). The Court of Appeals of South Carolina has adopted the even more deferential "abuse of discretion" standard when reviewing constitutional challenges to punitive damage awards. See *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 314, 319, 529 S.E.2d 45 (2000) ("[w]e find no abuse of discretion in the trial court's conclusions following its review of the jury verdict"); *Gamble v. Stevenson*, 305 S.C. 104, 112, 406 S.E.2d 350 (1991) ("[t]he amount of damages, actual and punitive, remains largely within the discretion of the jury, as reviewed by the trial court"). This standard has also been adopted by the District Court of Appeal of Florida. See *Owens-Corning Fiberglass Corp. v. Ballard*, 739 So.2d 603, 607 (Fla.Ct.App. 1998) ("the punitive damages award, while facially disproportionate to the amount of compensatory damages awarded, is not against the manifest weight of the evidence on this ground;" "we do not find that the trial court's failure to reduce the award was an abuse of discretion").

The Oregon courts employ yet a different standard when considering a challenge to an award of punitive damages as constitutionally excessive. On remand from *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994)[7], the Oregon Supreme

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[6] Notably, in every state court opinion discussed below, the application of a deferential standard of review resulted in the affirmance of the challenged punitive damage award.

[7] In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that the Due Process Clause requires the availability of post-verdict

Court established the following criterion to be applied in such cases: "A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue." *Oberg v. Honda Motor Co., Ltd.*, 320 Or. 544, 549 (1995).[8] In reliance upon *Oberg*, the Oregon Supreme Court recently held that "when reviewing a punitive damages award for excessiveness, **the reviewing court must view the facts in the light most favorable to the jury's verdict** if there is evidence in the record to support them" and that "the reviewing court must resolve all disputes regarding facts and factual inferences in favor of the jury's verdict and then determine, on the facts as the jury was entitled to fund them, whether the award violates the legal standard of gross excessiveness." *Parrott v. Carr Chevrolet Inc.*, 331 Or. 537, 2001 WL 25789, *10 (2001); emphasis added.

This sampling of the decisions of various states demonstrates the following:

1. State appellate courts across the nation are employing different standards when reviewing challenges to awards of punitive damages as grossly

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judicial review of punitive damage awards, however, the Court did not "address the more difficult question of what standard of review is constitutionally required." (*Id.* at 432, n. 10.)

[8] In *Stranahan v. Fred Meyer, Inc.*, 153 Or. App. 442, 467 & n. 21, 958 P.2d 854 (1998), the Oregon Supreme Court rejected the defendant's request for an abuse of discretion standard of review and instead applied its "rational juror" standard, holding that it was unable to say that the jury's punitive damage award of 16 times the compensatory damage award "was not 'within the range that a rational juror would be entitled to award in the light of the record as a whole.'" *Id.* at 471, quoting *Oberg*, 320 Or. at 551.

excessive under the Due Process Clause of the Fourteenth Amendment.

2. State appellate courts are not engaging in an independent, de novo review of constitutional challenges to punitive damage awards, but are instead applying deferential standards of review.

3. The absence of independent appellate review of punitive damage awards by state court juries is deteriorating the constitutional constraints on grossly excessive punitive damage awards announced by this Court in *BMW* and is yielding conflicting standards of review of such awards among the states.

4. Unless a uniform standard of independent, de novo review is imposed by this Court, the constitutional safeguards against grossly excessive punitive damage awards will be rendered meaningless.

Only through the explicit requirement of an independent appellate review of punitive damage awards can this Court's substantive due process limitation on grossly excessive punitive damage awards be meaningfully enforced and protected. See *BMW,* 517 U.S. 559; *TXO Production Corp. v. Alliance Res. Corp.,* 509 U.S. 443(1993); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1. Nonetheless, these constitutional protections are being eroded by divergent appellate standards of review. In the instant case, the Court of Appeal employed a highly deferential standard in upholding an award of punitive damages 340 times greater than the actual damages awarded. Such review effectively deprives the defendant of any rationality or predictability to the constitutional analysis and prevents any true adherence to the due process limitations on excessive punitive damage awards developed by this Court. Without an appellate court's independent assessment of the excessiveness of a punitive damage award according to fixed, objective criteria,

a defendant's constitutional protections are rendered meaningless. See *BMW,* 509 U.S. at 466 (Kennedy, J., concurring). Because punitive damage awards are mapped "onto an unbounded scale of dollars," they continue to be arbitrary and unpredictable. Cass R. Sunstein, et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law),* 107 Yale L.J. 2071, 2074 (1998). Deferential standards of review in this context serve only to sanction a jury's irrational verdict instead of subjecting it to the rigors of constitutional review, as required.

This Court has repeatedly held that legal issues, including the scope of fundamental constitutional rights, are reviewed de novo. See *Salve Regina College v. Russell,* 499 U.S. 225, 231-232 (1991); *United States v. First City Nat'l Bank,* 386 U.S. 361, 368 (1967); *Haynes v. Washington,* 373 U.S. at 515; *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 502-503 (1984); *Ornelas v. United States,* 517 at 697-698; *Miller v. Fenton,* 474 U.S. 104, 114 (1985). Only through this standard of review can precedent be established, the risk of confusion and arbitrariness minimized, predictability and reasonableness restored, and constitutional limits on awards of punitive damages enforced. See *Thompson v. Keohane,* 516 U.S. 99, 109-100, 115-116 (1995); *Bose Corp.,* 466 U.S. at 502. De novo review is necessary to guard against punitive damage awards exceeding the constitutional limits established by this Court. Only through "a detailed examination" of such awards, constrained by the guideposts established by this Court, can the nationwide trend of grossly excessive punitive damage awards be curtailed. *BMW,* 517 U.S. at 595 (Breyer, J., concurring).

The issues raised in this Petition are of nationwide jurisprudential significance. Recently, California Supreme Court Justice Janice R. Brown issued a concurring opinion (in which California Supreme Court Justice Ming W. Chin

concurred) discussing at some length her concerns regarding the punitive damages system and highlighting the need for clearer standards to be employed in assessing whether punitive damages are excessive. Among other things, Justice Brown observed that the Court was obligated:

> "to give meaning to the term 'excessive' in relation to punitive damages. Otherwise, the deferential standards of review that we affirm today will inhibit us in providing guidance to trial courts as to how their broad discretion should be exercised . . . [W]ithout clear guidance, judicial oversight of punitive damage awards will not be uniform, and the resulting gross variability in awards will ultimately implicate the rights of defendants to due process and the equal protection of the laws . . . Without a beginning point of reference, punitive damage awards tend to vary widely, depending as much on the vicissitudes of jury decision making as on the facts of the case. This variability can result in disparate and fundamentally unfair treatment of similarly situated defendants, a possibility we should not ignore."

Lane v. Hughes Aircraft Co., 22 Cal.4th 405, 421-422 (2000).[9]

Justice Brown posited that "[i]n the case of large awards, punitive damages should rarely exceed compensatory damages by more than a factor of three, and then only in the most egregious circumstance clearly evident in the record," noting that "while deterrence and retribution are part of the equation, fundamental notions of justice require some

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[9] In *Lane*, the California Supreme Court was not called upon to address the propriety of the amount of the punitive damage award but instead considered the standard to be applied in reviewing an order granting a motion for a new trial based upon the gross disproportion between the damages awarded and the plaintiffs' actual injuries.

correlation between punishment and harm." *Id.* at 423, 424. She observed that "our sister states have most frequently selected two or three times compensatory damages as the appropriate limitation on punitive damages. These jurisdictions include Connecticut, Delaware, Florida, Illinois, Indiana, Nevada, North Dakota, Oklahoma and Texas." *Id.* at 426, citing *BMW,* 571 U.S. at 615-616 (Ginsburg, J., dissenting [appendix]). Both federal and state courts remain without clear guidance from this Court as to the proper standard to be applied when reviewing an award of punitive damages subject to a federal constitutional challenge.

Emphasizing the strong societal interest in setting further standards for the assessment of punitive damages, Justice Brown wrote that "arbitrariness in punitive damage awards, even if only occasional, does not affect jury verdicts alone; it distorts settlements by adding disproportionate leverage to a plaintiff's demands, as well as uncertainty." *Lane,* 22 Cal. 4th at 427. As a result, courts have "the responsibility to define and restrain excessive damages, including punitive damages. *Lane,* 22 Cal. 4th at 428. The instant case has been tried to two juries and fully developed on appeal. It serves as the perfect vehicle for this Court's review of the standards to be employed in assessing excessive punitive damage awards.

In reviewing SAN PAOLO'S challenge to the constitutionality of this award, the Court of Appeal applied a substantial evidence (deferential) standard of review and not the de novo standard requested in SAN PAOLO'S Opening Brief. (App., *infra,* A-31, A-35-A-36; Appellant's Opening Brief, p. 14.) Notably, this Court has granted a Petition for Writ of Certiorari on the issue of whether, under the Due Process Clause of the Fifth Amendment to the United States Constitution, the standard of review of a federal trial court's ruling on a challenge to the

constitutionality of a punitive damage award is abuse of discretion or de novo. *Cooper Industries. Inc. v. Leatherman Tool Group, Inc.,* United States Supreme Court No. 99-2035 (punitive damage award of 90 times the amount of purely economic compensatory damages). Oral argument on this appeal was scheduled to be heard on February 26, 2001. As of the filing of this Petition, a decision has not yet been issued.

As in the instant case, in *Cooper Industries,* the Ninth Circuit Court of Appeal applied a deferential standard of review and determined that the federal district court did not abuse its discretion in refusing to reduce the punitive damage award. The thrust of this appeal is that federal constitutional due process limitations on excessive punitive damage awards under the Fifth Amendment can be enforced only through an independent, de novo review and not a deferential standard which renders the constitutional limitations illusory. SAN PAOLO'S Petition raises this substantial issue of federal constitutional jurisprudence under the Fourteenth Amendment to the United States Constitution as applied by state courts.

B. An Award of Punitive Damages in a Sum 340 Times Greater Than an Accompanying Award of Compensatory Damages is Violative of a Defendant's Fundamental Right to Due Process and is Excessive as a Matter of Law

The punitive damages award of $1,700,000.00 must be set aside as grossly excessive under the Due Process Clause of the Fourteenth Amendment. In this case, a gross disparity exists between the award of actual damages ($5,000.00) and punitive damages ($1,700,000.00), creating a punitive-to-actual damages ratio of 340 to 1. This Court has already ruled that a punitive-to-actual damages ratio of 4 to 1 is "close to the line" and that one of 500 to 1 is clearly

excessive, when the actual harm suffered is nominal and purely economic. *Pacific Mutual Life Insurance v. Haslip,* 499 U.S. 1; *BMW,* 517 U.S. 559. Notably, the instant case was not based on personal injury, nor was there any claim for bodily injury, emotional distress, wrongful death or any other injury traditionally warranting punitive damages. Rather, the jury found SIMON'S damages to be only the legal fees which he expended in connection with his attempt to purchase the Property.

The Due Process clause imposes a substantive limit on the size of punitive damage awards. *Honda Motor Co. v. Oberg,* 512 U.S. 415, 114 S.Ct. 2331, 2335 (1994). Although this Court has not established a bright line rule for identifying unconstitutionally excessive awards, it has indicated that "general concerns of reasonableness" should guide the inquiry and, more specifically, that punitive exactions should not be "greater than reasonably necessary to punish and deter." *Pacific Mutual Life Insurance v. Haslip,* 499 U.S. at 18, 22. Implicit within this "reasonably necessary" standard is the premise that over-deterrence and over-punishment are deemed to be unconstitutional. *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. at 463.

Simply put, punitive damages are punishment and, in many cases, severe punishment. Procedural due process requires the imposition of additional trial protections to establish sufficient confidence in the outcome in these situations. Indeed, many courts (including this Court) have addressed this issue, and all conclude that the following factors must be considered in determining an appropriate amount of punitive damages:

1. Whether the defendant has engaged in repeated misconduct (which is deemed more reprehensible than an individual instance of malfeasance), or whether it is

an isolated and rare incident. *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995);

2. Whether the harm suffered involves only economic harm, rather than harm to the health or safety of individuals. *Federal Deposit Ins. Corp. v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997);

3. Whether all three criteria for assessing punitive damages were properly applied (amount of actual damages; magnitude of the offense, and the defendant's wealth). *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241 (9th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3257;

4. Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct, as well as the harm that actually has occurred. *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1132 (9th Cir. 1997); and

5. Whether the punitive-to-actual-damages ratio is "unconstitutionally excessive." *Id.*

This Court has also observed that the Due Process Clause imposes a limit on punitive damages awards which are grossly excessive. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. at 420. Judicial review of the size of punitive damages awards has been a safeguard against excessive awards for as long as punitive damages have been awarded. *Id.* at 421. A critical criterion in evaluating a punitive damages award involves a comparison of the actual damages with the punitive damages. An award of punitive damages must bear a reasonable relationship to the amount of actual damages awarded. *BMW*, 517 U.S. at 580. This "reasonable relationship" rule exists to guard against clear excess. *Id.* at 581.

The punitive damage award of $1,700,000.00 here bears no reasonable relationship to SIMON'S actual damages of

$5,000.00. Federal courts have repeatedly held that punitive damages are excessive when the ratio between punitive and actual damages is much closer than in the present case. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. at 23 (4 to 1 is "close to the line"); *Federal Deposit Ins. Corp. v. Hamilton,* 122 F.3d at 861 (10 to 1 ratio is "unconstitutionally excessive in a broad range of cases;" a ratio of 27 to 1 is unconstitutionally excessive under the Supreme Court's decision in *BMW* and the 10th Circuit's subsequent decision in *Continental Trend Resources v. OXY USA,* 101 F.3d 634, 639 (10th Cir. 1996)); *Ace v. Aetna Life Ins. Co.,* 139 F.3d at 1248-1249 (130 to 1 is far beyond any amount approved by the Alaska courts); and BMW, 517 U.S. 559, citing *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. at 482 (a breathtaking 500 to 1 ratio must surely "raise a suspicious judicial eyebrow.") Indeed, common experience itself suggests that punitive-to-actual damage ratios in excess of 5 to 1 are excessive. See *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. at 23.[10]

A punitive damages ratio of 340 to 1 awarded to SIMON for purely economic injury is clearly excessive in light of the above-outlined standards. The purpose and function of punitive damages is to punish wrongdoing and thereby protect the public from future misconduct, either by the same defendant or by other potential wrongdoers. *BMW,* 517 U.S. at 568. That function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the conduct, exceeds the level necessary to properly punish and deter.

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[10]California courts have also found excessive punitive to actual damage award ratios closer than that awarded to SIMON herein. See, e.g., *Auerbach v. Great Western Bank,* 74 Cal.App.4th 1172, 1190 (1999) (385 to 1 found "out of proportion to the actual damages suffered"); *Seeley v. Seymour,* 190 Cal.App.3d 844, 866-869 (1987) (13.3 to 1 is clearly excessive).

While reiterating the well-established principle that there is no bright-line mathematical formula for determining an acceptable relationship between punitive and actual damages, this Court has nevertheless recognized: "When the ratio [of punitive to actual damages] is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow." *BMW,* 517 U.S. at 583, citing *TXO Production Corp.,* 509 U.S. at 482. In *BMW,* an individual brought suit against an automobile manufacturer seeking damages on the grounds that his new car had been re-painted to conceal damaged paint before he purchased the car, and that the value of the car had thus been diminished without his knowledge. The result at trial, almost identical to the result here, was an award of actual damages in the amount of $4,000.00, and a punitive damages award of $2,000,000.00. This Court held that the punitive damages were grossly excessive and violative of due process, stating:

> To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, . . . can warrant a substantial penalty. But this observation does not . . . justify a significant sanction in addition to compensatory damages.

(*BMW,* 517 U.S. at 576.)

In rejecting a punitive damages ratio of 500:1, this Court held that infliction of economic injury, even when done intentionally, does not justify significant sanctions on top of compensatory damages. Here, SIMON suffered only economic injury. Wherever the "line of impropriety" is drawn, punitive damages which are 340 times greater than the actual damages is well past it, warranting a substantial reduction (if not complete reversal) of the award. Very few cases involve ratios of punitive to compensatory damages anywhere close to the 340:1 ratio in the instant case. Further, these authorities pre-date the *BMW* decision, which sets forth the modern standard for determining

whether a punitive damages award passes constitutional muster.

In *Neibel v. Trans World Assurance Co.,* 108 F.3d at 1132, the Ninth Circuit held that, in economic injury cases, if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a 10 to 1 ratio. *Id.* The jury here was left to impose punitive damages upon SAN PAOLO based upon inflammatory, prejudicial, and unsupported argument and wealth. The verdict was based upon bias and visceral reactions, and was therefore arbitrary and discriminatory. As one Court has noted:

> The process through which a fact finder finds punitive damages is somewhat contradictory . . . The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to 'how much' is necessary to punish and deter.

(*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.,* 155 Cal.App.3d at 388.)

It is this same arbitrary process which resulted in the award of punitive damages of over 340 times the actual harm suffered by SIMON in this case.

C. The Assessment of Punitive Damages Under California Law Constitutes an Imposition of a Criminal Punishment Without Adequate Standards

Punitive damages are punishment and, in this case, an excessive punishment. Under the test to determine the requirements of procedural due process, additional protections are required. This is especially true when punishment is involved. In such situations, the safeguards of criminal law are necessary.

Generally, punishment is the domain of criminal law. The fact that states have chosen to enforce punishment through civil action does not affect constitutional requirements. In *Giaccio v. Pennsylvania,* 382 U.S. 399, 402 (1966), the United States Supreme Court held that the placement of a civil label on a statute did not affect the application of due process principles. While economic regulations may be subject to a less strict vagueness standard, punitive damages require a heightened level of scrutiny, as they constitute punishment. Punitive damage awards are "quasi-criminal,"[11] "serve the same function as criminal penalties,"[12] and are private fines imposed to punish and deter conduct.[13] Close scrutiny is appropriate because of the stigma and loss of reputation which attaches to a punitive damages award. See *Wisconsin v. Constantineau,* 400 U.S. 433 (1971).

State action is present where punitive damages are awarded. This is due to the fact that the punitive damages are being awarded through a government-sanctioned function (namely, the judicial system). In a sense, plaintiffs

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[11] *Smith v. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J. dissenting).

[12] *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 82-84 (1971) (Marshall, J. dissenting).

[13] *Gertz v. Robert Welch, Inc.,* 481 U.S. 323, 350 (1974).

are acting as private attorneys general in seeking to enforce California law. See *In Re Paris Air Crash,* 622 F.2d 1315, 1320 (9th Cir. 1980), *cert. denied,* 449 U.S. 976(1980). The fact that the punishment is imposed in a civil action does not insulate the matter from due process scrutiny. *A.B. Small Co. v. American Sugar Refining Co.,* 267 U.S. 233, 239 (1925).

Notwithstanding the foregoing, standards relating to the review of punitive damage awards remain vague. New standards are needed in order to assure that punishment is fair. Notably, as discussed above, the Court has recognized the need for independent appellate review on virtually all issues involving the scope of fundamental constitutional rights. Recently, in *United States v. Bajakajian,* 524 U.S. 321 (1998), the Court confronted the issue of whether a criminal forfeiture contravened the Excessive Fines Clause of the Eighth Amendment, which involves consideration of many of the same factors outlined in *BMW* for determining whether a punitive damage award is unconstitutionally excessive. The Court expressly rejected abuse of discretion review therein, holding that "the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate." *Id.* at 337-337, n. 10.

In other cases, the Court has repeatedly implicitly acknowledged that constitutional "excessiveness" challenges to civil penalties under the Excessive Fines Clause and criminal sentences under the Cruel and Unusual Punishment Clause of the Eighth Amendment are to be reviewed de novo. See *St. Louis, Iron, Mountain & S. Ry. Co. v. Williams,* 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher,* 238 U.S. 482, 490-491 (1915); *Solem v. Helm,* 463 U.S. 277, 290-303 & n. 16 (1983). In light of this Court's recognition of the need for independent,

de novo appellate review when constitutional rights are invoked, the deferential "substantial evidence" standard employed by California and other state courts across the nation when confronted with challenges to punitive damage awards under the Due Process Clause of the Fourteenth Amendment must be rejected if there is to be any meaningful enforcement of the standards set forth in *BMW*.

D. Compensatory Damages Based On a Claim Expressly Rejected by the Factfinder Should Not be Considered in Determining the Reasonableness of an Award of Punitive Damages

In holding that SIMON'S punitive damage award can be based upon his alleged benefit of the bargain (or lost profits), the Court of Appeal improperly drew an implication *directly contrary* to the express factual determinations of the first jury. After being properly instructed as to the requirements for finding a breach of contract, the first jury determined that there was none, specially finding that there was no binding and enforceable agreement between SAN PAOLO and SIMON whatsoever. (App. Vol. III, 613.) Notably, the bulk of the jury instructions regarding SIMON'S claim for breach of contract were agreed upon by the parties prior to trial. (App. Vol. II, pp. 502, 504-517.)

Because, as the first jury correctly decided, there was no binding, enforceable contract between the parties, SIMON was never entitled to purchase the Property. Therefore, his alleged lost profits simply are not within the range of harm for which punitive damages are available. SIMON'S compensatory damages of $5,000.00 represent the only legally recognizable actual harm which SIMON suffered in this transaction.

In response to the claim of SAN PAOLO that the punitive damages awarded ($1,700,000) were grossly

disproportionate to the compensatory damages awarded ($5,000) to SIMON, the Court of Appeal determined that the ratio was not 340:1, but was "just over 4 to 1," based upon its belief that "Simon's loss was at least the $400,000 difference between the appraised value and the price at which King falsely promised to sell the building." (App., *infra,* A-30 – A-31.) This portion of the Opinion, however, does not take into account the salient fact that these damages were never even awarded. (App. Vol. III, 613-614.)

At the first trial, SIMON sought not only consequential damages incurred in retaining an attorney to review the transaction, but also damages for his lost "benefit of the bargain" under his claim for breach of contract. (R.T., Vol. 10, 1915: 7-12, 1916: 3-6, 1927: 15-16.) The first jury however refused to award SIMON anything for the alleged lost value in the Property. (App. Vol. III, 613-614.) Despite the fact that this claim was rejected, SIMON still argued to the second jury that his lost value in the Property was $400,000.00. The first jury had already rejected this argument and awarded only the sum of $5,000.00, representing attorneys' fees incurred by SIMON in connection with this transaction. (App. Vol. III, 616.) Further, the amount of compensatory damages was not re-litigated in the second trial. (R.T., Vol. 7, 1204:2 – 1205:22.)

In its Opinion, the Court of Appeal posits that an analysis of "the actual harm the plaintiff has suffered" can take into account compensatory damages not legally available to a plaintiff. (App., *infra,* A-30 – A-31.) Such is not the case when a jury has already found against the plaintiff on his claim for "actual harm." The authorities cited by the Court do not involve a prior adjudication of the actual harm suffered by the plaintiff, as in the instant case, and do not

hold that a plaintiff may rely on alleged damages sought on a dismissed claim to enhance his punitive damages award.[14]

Further, the Court of Appeal's reliance upon *TXO Production Corp.*, 509 U.S. 443, for the contention that the punitive damage award should be based upon SIMON'S alleged (but rejected) actual harm of $400,000.00 was misplaced. (App., *infra,* A-31, n.9.) *TXO* involved an action for slander of title, where it was shown that TXO had engaged in a pattern of fraud nationwide and, in this case, attempted to renegotiate an oil and gas royalty arrangement with Alliance by deceiving it into believing that Alliance did not have good title to oil and gas rights when they were conveyed to TXO. Beyond the fact that the repeated wrongful conduct by TXO soars far beyond the isolated incident at issue herein, the Court in *TXO* was not confronted with a jury verdict which awarded punitive damages based upon alleged harm which had already been rejected by a prior jury.

SIMON should not have been allowed to request punitive damages based upon $400,000.00 in alleged lost profits since (a) there was no such award, and (b) this claim had already been rejected. The prejudice is obvious, as the jury's consideration of this claim improperly inflated the punitive damages by an excessive (and unconstitutional) amount.

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[14]For example, in *Gagnon v. Continental Casualty Co.,* 211 Cal.App.3d 1598 (1989), the California Court of Appeal upheld the plaintiffs right to recover punitive damages notwithstanding the fact that she did not have standing to recover compensatory damages arising out of an insurer's termination of her husband's (the decedent's) benefits under a disability insurance policy. The Court did not address the enhancement of a punitive damages recovery based upon damages sought pursuant to a claim on which the plaintiff had already lost.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: March 12, 2001 Respectfully submitted,

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APPENDIX 1

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 17
HON. RICHARD P. KALUSTIAN, JUDGE

LIONEL SIMON, ET AL.,
PLAINTIFFS,
VS.
SAN PAOLO BANK, ET AL.,
DEFENDANTS.

NO. BC 152431

REPORTERS' TRANSCRIPT OF PROCEEDINGS
AUGUST 1, 4, 5, 6, 7, 8, 11, 12, 1997
OCTOBER 3, 8, 1997; DECEMBER 9, 1997
FEBRUARY 20, 1998; MARCH 6, 9, 10, 1998
MARCH 11, 12, 13, 1998; APRIL 8, 1998

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GLORIA J. HALL, CSR #4165
OFFICIAL REPORTER

LOS ANGELES, CALIFORNIA;
WEDNESDAY, APRIL 8, 1998

8:45 A.M.

DEPARTMENT NO. 17

HON. RICHARD P. KALUSTIAN, JUDGE

THE COURT: SIMON VERSUS SAN PAOLO BANK.

MR. JARDINI: GOOD MORNING, YOUR HONOR. ANDY JARDINI FOR LIONEL SIMON.

MR. LUDWIG: GOOD MORNING, YOUR HONOR. MITCHELL LUDWIG ALSO FOR PLAINTIFF LIONEL SIMON.

MR. RICHMAN: GOOD MORNING, YOUR HONOR. STEVEN RICHMAN FOR THE DEFENDANT.

I HAVE READ THE TENTATIVE RULING. I WILL RESTRICT MY RESPONSE TO THE OPPOSITION FILED BY MR. SIMON TO OUR MOTIONS. BEFORE DOING THAT, HOWEVER, I WOULD LIKE TO INQUIRE OF THE COURT. WE DID FILE

OBJECTIONS AND REQUESTS TO STRIKE PORTIONS OF MR. LUDWIG'S —

THE COURT: I DIDN'T READ THE DECLARATION AT ALL.

MR. RICHMAN: SO I ASSUME IT'S BEEN REJECTED?

THE COURT: I DIDN'T READ IT, SO YOUR OBJECTION IS SUSTAINED. WHEN I SAW THAT IT WAS GOING TO BE A RECAP OF THE TRIAL, I JUST DIDN'T READ IT.

MR. RICHMAN: THERE ARE JUST A FEW COMMENTS I'D LIKE TO MAKE WITH REGARD TO THE OPPOSITION FILED BY MR. SIMON'S COUNSEL.

FIRST IS THAT COUNSEL DOES ACKNOWLEDGE THE STATEMENTS MADE DURING CLOSING WHICH WE BELIEVE TO BE INFLAMMATORY. THEY OBVIOUSLY DENY THAT THEY ARE INFLAMMATORY, BUT THE WORDS SPEAK FOR THEMSELVES.

TO ACCUSE SAN PAOLO OF COMMITTING A CRIME THREE TIMES, TO USE AN ANALOGY OF ATTEMPTED MURDER OF SOMEONE SHOOTING A GUN INTO A CROWD, AND NOT JUST ANYONE, BUT THE PRESIDENT OF SAN PAOLO BANK, IS CLEARLY INAPPROPRIATE.

AND TO ACCUSE SAN PAOLO OF CRIMES AND BRIBES WHERE THERE IS NO EVIDENCE OF IT, AND TO USE STATEMENTS SUCH AS LUNCH MONEY AND PARKING TICKETS WITH REGARD TO COMPARISON TO PUNITIVE DAMAGES IS CLEARLY INFLAMMATORY AND HAS NO PLACE IN FRONT OF A JURY.

AND THOSE TYPES OF COMMENTS ARE MADE FOR ONE PURPOSE ONLY, AND THAT'S TO INFLAME THE JURY. AND THOSE COMMENTS SHOULD NEVER BE MADE. COUNSEL SAYS THEY ARE NOT INFLAMMATORY, BUT THEY HAVE NO BUSINESS BEING MADE, ESPECIALLY THE SECOND TIME AROUND.

THE COURT: I DON'T RECALL THERE BEING AN OBJECTION.

MR. RICHMAN: THE COURT INSTRUCTED US NOT TO MAKE ANY OBJECTIONS DURING CLOSING. AND IT IS IN THE TRANSCRIPT AND I CAN QUOTE IT. I HAVE —

THE COURT: I THINK WHAT I SAID WAS DON'T MAKE OBJECTIONS BASED UPON THE OBJECTION "MISSTATES THE EVIDENCE" BECAUSE EACH SIDE — UNLESS IT'S A GROSS MISSTATEMENT, SO GROSS THAT I HAVE TO CORRECT IT. BUT EACH SIDE HAS A DIFFERENT VIEW OF THE EVIDENCE. THAT'S WHY WE HAVE TRIALS.

AND IF LAWYERS ARE CONTINUALLY MAKING THE OBJECTION "MISSTATES THE EVIDENCE," ALL WE END UP WITH IS A TOTALLY DISJOINTED ARGUMENT. AND THAT'S WHY I SAID THAT. I THINK I ADMONISHED THE JURY IN THE BEGINNING THAT THIS WAS THE CASE, AND THEIR VIEW OF THE EVIDENCE SHOULD PREVAIL. BUT THAT DOES NOT HAVE ANYTHING TO DO WITH STATEMENTS YOU CONSIDER INFLAMMATORY AND NOT PART OF THE EVIDENCE. SO YOU SHOULD HAVE OBJECTED.

MR. RICHMAN, I READ THE STATEMENTS. I DON'T FIND THEM SO INFLAMMATORY THAT IT'S GOING TO CHANGE THE JURORS' MINDS. LAWYERS ARE GIVEN WIDE LATITUDE IN ARGUMENT TO MAKE THE ARGUMENTS THAT THEY WANT TO UNLESS THEY JUST GET WAY OUT OF HAND. AND I DON'T SECOND GUESS THE WAY ARGUMENTS ARE CONDUCTED. IT DOESN'T MAKE ANY SENSE TO DO THAT.

MR. RICHMAN: I JUST DON'T SEE HOW ONE CAN RECONCILE THE ACCUSATIONS OF CRIMINAL CONDUCT AND ATTEMPTED MURDER, A GUN SHOOTING INTO THE CROWD. THAT HAS NO BASIS IN THE CASE AT ALL.

THE COURT: BUT MR. RICHMAN, I THINK THE JURORS COMPLETELY UNDERSTOOD WHAT MR. JARDINI WAS SAYING. I DID. I DIDN'T ASSUME THIS WAS CRIMINAL CONDUCT. JUST BECAUSE SOMEBODY SAYS SOMETHING DOESN'T MEAN THAT THE PERSON RECEIVING THE INFORMATION IS GOING TO ASSUME IT THAT WAY. FRANKLY, I DIDN'T TAKE IT THAT WAY AND I DON'T THINK —

MR. RICHMAN: IT HAS NO BASIS FOR EVEN BEING SAID. IT SHOULD NOT BE SAID IN FRONT OF A JURY. THIS IS A CIVIL CASE. TO ACCUSE SOMEONE OF A CRIME, ESPECIALLY ATTEMPTED MURDER OR BRIBERY WHERE THERE IS NO EVIDENCE IS TOTALLY INAPPROPRIATE. AND WE SHOULDN'T HAVE BEEN PUT IN A POSITION TODAY OF SPECULATING WHETHER OR NOT THE JURY TOOK THAT INTO CONSIDERATION. I WOULD THINK THEY DID.

BUT THE POINT IS COUNSEL PUT IT INTO PLAY AND SHOULDN'T HAVE. AND I THINK IT'S UNDISPUTED THAT THOSE TYPE OF ALLEGATIONS HAVE NO BASIS IN THIS TYPE OF COURT, ESPECIALLY IN A CIVIL CASE.

THE COURT: I DISAGREE.

MR. RICHMAN: THE SECOND POINT I'D LIKE TO MAKE IS THE OPPOSITION IGNORES THE BMW AND HASLIT CASES. IT IGNORES THE FACT THAT THOSE CASES SEEM TO INDICATE THAT ANY RATIO GREATER THAN 4 TO 1 RAISES EYEBROWS OF SUSPICION. AND ONE HAS TO QUESTION WHETHER OR NOT IT'S AN APPROPRIATE ORDER.

THIS IS FAR IN EXCESS OF THE CLEAR MAJORITY OF THE CASES. THERE ARE ALWAYS EXCEPTIONS CITED BY THE PLAINTIFF. BUT IN THIS CASE, THE CONDUCT DOESN'T JUSTIFY AN AWARD OF $1.7 MILLION DOLLARS FOR A $5,000 COMPENSATORY AWARD.

AND THOSE CASES, ESPECIALLY THE HASLIT AND BMW CASES WHICH ARE 1990 SUPREME COURT CASES DECIDED WITHIN THE LAST TWO TO FOUR YEARS, HAS TO BE TAKEN IN CONSIDERATION BY THIS COURT. AND THEY DON'T JUSTIFY THE TYPE OF AWARD IN THIS CASE.

I WOULD AGAIN ASK THE COURT TO INDEPENDENTLY WEIGH THE EVIDENCE. THE COURT HAS AN OBLIGATION TO REWEIGH THE EVIDENCE. THAT IS THE DOMAIN OF THE JUDGE. BUT THE FACT THAT WE HAVE HAD A SECOND TRIAL OF THIS DOESN'T MEAN THAT TWO WRONGS MAKE A RIGHT.

THE COURT PREVIOUSLY REDUCED THE AWARD. I WOULD SUBMIT IT SHOULD DO SO AGAIN. AT SOME POINT IT WILL BE CITED ON APPEAL AS TO WHAT THE REASONABLENESS IS. BUT THE POINT IS THE COURT HAS AN INDEPENDENT DUTY TO WEIGH THE EVIDENCE AND NOT TO ACCEPT THE JURY AT FACE VALUE, ESPECIALLY IN LIGHT OF CONDUCT OF COUNSEL IN CLOSING AND IN LIGHT OF THE EVIDENCE.

COUNSEL ALSO MISSTATED THE EVIDENCE AND THE LAW WITH REGARD TO THE ISSUE OF HARM. WE BROUGHT A MOTION IN LIMINE TO PREVENT ANY APPRAISALS COMING IN THE SECOND TIME SINCE THE FIRST JURY AWARDED $5,000. BUT YET, PLAINTIFF WAS ALLOWED TO INTRODUCE NEW TESTIMONY FROM A NEW EXPERT IN WHICH HE TESTIFIED THAT IT WAS $400,000 IN HARM.

BUT THE LAW IS CLEAR THE HARM WAS CALCULATED AT THE FIRST TRIAL AND THAT WAS $5,000. AND IT WAS WRONG TO ALLOW NEW EVIDENCE TO COME IN ON HARM FOR HARM TO EVEN BE DISCUSSED BECAUSE THE JURY HAD ALREADY ISSUED THAT AWARD.

THE COURT: WELL, THAT'S A KNOTTY LITTLE AREA, MR. RICHMAN. I HAVE READ THE CASES AND THAT'S A KNOTTY LITTLE AREA. AND IF THERE IS A DAMAGE AWARD, CAN YOU STILL CONSIDER IT THE SAME WAY YOU'D CONSIDER IF THERE WERE NO DAMAGE AWARD, BUT THE AWARD FOR THE PLAINTIFF WERE FOR AN INJUNCTION OR SOME OTHER EQUITABLE RELIEF? I AM JUST NOT SURE.

I THINK I UNDERSTAND YOUR ARGUMENT. AND I GUESS AT THIS POINT, LET ME MAKE THESE COMMENTS SO YOU UNDERSTAND WHY I AM DOING WHAT I AM DOING AND THE COURT OF APPEAL WILL UNDERSTAND BECAUSE I AM SURE IT WILL LAND THERE. PROBABLY IT OUGHT TO LAND THERE, I GUESS.

LET ME TELL YOU WHAT I THINK HAPPENED. I THINK THE JURY CONSIDERED MR. KING'S CONDUCT REPREHENSIBLE. I KNOW YOU HAVE A DIFFERENT VIEW OF WHAT HE DID. BUT I JUST THINK THAT THE JURY CONSIDERED, THEY LOOKED AT MR. KING, THEY LISTENED TO MR. KING, THEY EVALUATED MR. KING. IN FACT, BOTH JURIES DID. AND I HAVE COME TO THE CONCLUSION AFTER TWO JURY TRIALS THAT THEY THOUGHT KING WAS LYING. I KNOW YOU DON'T THINK SO, AND IT MAY NOT BE TRUE. I SIMPLY DON'T KNOW AS A MATTER OF FACT. BUT I CAN TELL YOU THAT'S THE WAY I READ IT.

AND THE WITNESSES WHO SUPPORTED KING, I THINK THE JURY BELIEVED THEY LIED, TOO. LYING IS VERY POWERFUL IN COURT IF THE JURY BELIEVES THAT SOMEBODY LIES.

WE CAN DISCUSS WHETHER MR. KING LIED FOREVER AND PROBABLY NEVER COME TO A CONCLUSION, MR. RICHMAN. AND I DO NOT PASS JUDGMENT ON WHETHER HE LIED OR DIDN'T LIE. BUT I THINK THAT'S WHERE THE JURY DID IT. I THINK THEY THOUGHT HIS CONDUCT WAS TOTALLY UNCALLED FOR AND REPREHENSIBLE. AND I THINK THAT'S WHY THEY LEVELED THE PUNITIVE DAMAGES. A

DIFFERENT JURY HEARING ABOUT THE SAME EVIDENCE DID IT AGAIN.

I WOULD CONSIDER $1.75 MILLION DOLLARS VERY CLOSE TO $2.5 MILLION DOLLARS WHEN YOU CONSIDER IT IN RELATIONSHIP TO THE $5,000 IN COMPENSATORY DAMAGES.

MR. RICHMAN: I AM NOT HERE TO ARGUE ABOUT MR. KING. MY POINT IS THAT THE AWARD OF PUNITIVE DAMAGES, NO MATTER WHAT THE JURY FELT ABOUT MR. KING IS DISPROPORTIONATE TO THE AWARD OF COMPENSATORY DAMAGES.

IT'S UNDISPUTED THE FIRST JURY AWARDED $5,000 IN COMPENSATORY DAMAGES DESPITE A REQUEST FOR OVER A MILLION DOLLARS IN DAMAGES. I THINK THAT IS THE POINT THAT HAS TO BE FOCUSED UPON. ONCE THAT AWARD COMES IN AT $5,000, ANY PUNITIVE DAMAGE AWARD HAS TO BE LIMITED TO A RATIO THAT IS IN COMPLIANCE WITH HASLIT AND BMW.

AND REGARDLESS OF MR. KING'S CONDUCT, NO MATTER HOW REPREHENSIBLE OR NOT, IT HAS TO BEAR SOME RELATION TO THAT. IT'S MY FEELING THAT THE JURY, WHEN SEEING THE FINANCIAL STATEMENT WITH $50 MILLION DOLLARS ON IT AND HAVING NO GUIDANCE WITH REGARD TO WHAT IS REASONABLE IS GOING TO LOOK AT THE FINANCIAL STATEMENT OF $50 MILLION DOLLARS AND LISTEN TO THE CLOSING ARGUMENT OF COUNSEL WITH THE ALLEGATIONS OF CRIMINAL CONDUCT AND ATTEMPTED MURDER AND SAYING THAT A $15,000 AWARD IS A PARKING TICKET OR LUNCH

MONEY AND WITHOUT ANY GUIDANCE, THEY ARE GOING TO GO AHEAD AND AWARD A MILLION OR $2 OR $3 MILLION DOLLARS BECAUSE WHEN COMPARED TO A FINANCIAL STATEMENT, IT'S INCONSEQUENTIAL.

BUT IT TOTALLY IGNORES ONE OF THE THREE CRITICAL ELEMENTS OF AN AWARD OF PUNITIVE DAMAGES, AND THAT IS SOME REASONABLE RELATIONSHIP TO THE COMPENSATORY AWARD. AND IT JUST SHOCKS ME. AND I AM SURE ANYONE READING OR REVIEWING THIS CASE WILL BE SHOCKED TO SEE A COMPENSATORY AWARD OF $5,000 FOLLOWED UP BY A PUNITIVE DAMAGE AWARD OF $1.75 MILLION DOLLARS.

THE COURT: IF THAT'S ALL YOU KNEW ABOUT THE CASE, THOSE TWO FACTS, IT PROBABLY WOULD SHOCK MOST PEOPLE, I AGREE. BUT THAT ISN'T WHERE IT BEGINS NOR WHERE IT ENDS. THERE IS A WHOLE CASE IN BETWEEN THOSE TWO BOOKENDS.

MR. RICHMAN, I UNDERSTAND YOUR ARGUMENT. I HAVE FULLY READ YOUR BRIEF. IN FACT, IT'S WELL DONE. YOU MADE YOUR POINT VERY CLEARLY.

MR. RICHMAN: ONE LAST POINT I'D LIKE TO MAKE IS THAT THERE IS ALWAYS ANOTHER STORY TO THE CASE. AND THE SAME IS TRUE WITH THE BMW. BUT THE SUPREME COURT HAS STATED ON MORE THAN ONE OCCASION THAT WHEN THE RATIO EXCEEDS 4 TO 1, IT HAS TO BE LOOKED AT WITH A CRITICAL EYE. AND SOME CASES SAY IT SHOULD BE PRESUMPTIVELY SUBJECT TO OBJECTION AND OVERTURNED IF

IT'S GREATER THAN THOSE RATIOS. AND 4 TO 1 IS FAR IN EXCESS OF THOSE CASES AND DOES NOT BEAR A SUPPORT OR AFFIRMATION BY THIS COURT.

THE COURT: WELL, THERE ARE MANY CASES ON PUNITIVE DAMAGES. AND THERE IS A THREE PART TEST FOR PUNITIVE DAMAGES. BUT AS A PRACTICAL MATTER, IT BOILS DOWN TO ABOUT THE SAME SORT OF ANALYSIS THAT THE JURY GIVES TO EMOTIONAL DISTRESS DAMAGES. IT'S NOT DONE WITH ANY PARTICULAR PRECISION. AND THE CASES HAVE NOT REQUIRED THAT IT BE DONE WITH PARTICULAR PRECISION.

I HAVE ANALYZED IT FROM THE STANDPOINT OF EACH OF THE THREE TESTS, AND I HAVE CONCLUDED THAT IN ALL THE FACTS IN THIS CASE AND THE TWO TRIALS, THE TWO VERDICTS AND EVERYTHING THAT I HEARD IN THE CASE, THE MOTION IS DENIED.

MR. JARDINI: THANK YOU, YOUR HONOR.

THE COURT: I WILL PROBABLY BE SEEING YOUR FIRST PAPERS FAIRLY SOON.

MR. RICHMAN: I WILL REQUEST NOTICE OF THE RULING.

THE COURT: MR. JARDINI, YOU WANT TO GIVE NOTICE?

MR. JARDINI: WELL, YOUR HONOR —

MR. RICHMAN: THERE IS A JUDGMENT. I'D LIKE TO REVIEW IT. AND I WILL CALL COUNSEL TODAY. I DON'T THINK WE HAVE ANY OBJECTIONS TO IT.

MR. JARDINI: I WILL ADVISE THE COURT.

MR. LUDWIG: I SERVED THE JUDGMENT A WHILE AGO ON THEIR OFFICES. IT'S BEEN WITH THE COURT.

THE COURT: HAVE YOU TAKEN A LOOK AT IT?

MR. RICHMAN: I HAVE NOT, BUT I WILL LOOK AT IT EITHER NOW OR WHEN I GET BACK TO THE OFFICE AND CALL COUNSEL UP.

MR. LUDWIG: I FILED IT THE MONDAY AFTER THE TRIAL.

THE COURT: WELL, WHY DON'T YOU GIVE US A CALL IF THERE IS ANYTHING GLARING ABOUT IT. GIVE US A CALL THIS AFTERNOON. IT LOOKS LIKE IT'S IN ORDER TO ME.

ESSENTIALLY, IT'S JUST A RECITATION OF THE JURY VERDICT, AND THAT'S WHAT THE JUDGMENT IS. BUT IF I DON'T HEAR ANYTHING FROM ANYBODY, I WILL SIGN IT.

MR. RICHMAN: VERY WELL.

THE COURT: THANK YOU, GENTLEMEN. IT'S BEEN A PLEASURE SEEING YOU TWICE.

(WHEREUPON, PROCEEDINGS WERE CONCLUDED)

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT NO. 17
HON. RICHARD P. KALUSTIAN, JUDGE

LIONEL SIMON, ET AL.,
PLAINTIFFS,
VS.
SAN PAOLO BANK, ET AL.,
DEFENDANTS.

BC 152431
REPORTER'S CERTIFICATE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } SS

I, GLORIA J. HALL, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 2003, COMPRISES A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD ON AUGUST 1, 1997; AUGUST 4, 5, 6, 7, 8, 1997; AUGUST 11, 12, 1997; OCTOBER 3, 1997; OCTOBER 22, 1997; DECEMBER 9, 1997; FEBRUARY 20, 1998; MARCH 6, 1998; MARCH 9, 10, 11, 12, 13; 1998 AND APRIL 8, 1998 IN THE MATTER OF THE ABOVE-ENTITLED CAUSE.

DATED THIS 11TH DAY OF AUGUST, 1998.

/s/ GLORIA J. HALL
OFFICIAL REPORTER #4165

APPENDIX 2

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

LIONEL SIMON, DBA LIBERTY PAPER COMPANY,

Plaintiff, Respondent and Cross-Appellant,

v.

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Defendant, Appellant and Cross-Respondent.

B121917

(Super. Ct. No. BC152431)

COURT OF APPEAL SECOND DISTRICT
FILED
AUGUST 28, 2000
JOSEPH A. LANE CLERK

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard P. Kalustian, Judge. Affirmed.

Epport & Richman, Lawrence A. Abelson, Beth Ann R. Young and Steven N. Richman for Defendant, Appellant and Cross-Respondent.

Knapp, Petersen & Clarke, Andre E. Jardini, Mitchell B. Ludwig and Kevin J. Stack for Plaintiff, Respondent and Cross-Appellant.

BACKGROUND

On June 21, 1996, cross-appellant, Lionel Simon, commenced this action against San Paolo Bank (hereinafter "the bank") and appellant, San Paolo U.S. Holding Company, Inc. ("San Paolo").[1] Simon sought specific performance of an alleged contract to purchase real property, located at 816 Figueroa Street in Los Angeles. He also sought damages for breach of the contract, as well as damages for fraud, consisting of a false promise to sell the property to Simon under certain terms and conditions.

The issues of liability and punitive damages were tried separately by jury, beginning on August 1, 1997.[2] By special verdict rendered on August 12, 1997, the jury found that there had been no enforceable contract between the parties. However, the jury found in favor of Simon on the fraud cause of action, awarded him $5000 in compensatory damages, and $2,500,000 in punitive damages.

San Paolo brought motions for a new trial, a reduction in punitive damages, and judgment notwithstanding the verdict. Simon brought a motion for new trial as to damages. The trial court denied Simon's motion, as well as San Paolo's motion for judgment notwithstanding the verdict. The trial court granted San Paolo's motion for new trial, subject to Simon's acceptance of a reduction in punitive damages to $250,000. Simon refused to accept the

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[1]San Paolo Bank, the parent company of San Paolo U.S. Holding Company, was eliminated as a defendant after its motion for summary judgment was granted. We affirmed the judgment entered in its favor in case No. B 113208, filed May 21, 1998.

[2]San Paolo states in its opening brief that a pretrial summary adjudication eliminated the specific performance count and one of two contract counts. Simon responds that the summary judgment eliminated a cause of action for tortious breach of the covenant of good faith and fair dealing, not a contract claim. However, neither the motion nor the order granting it has been made a part of the record on appeal.

remittitur, and the issue of punitive damages was tried to a new jury, beginning March 6, 1998.

The second jury assessed punitive damages in the amount of $1,700,000, and San Paolo's motion for new trial was denied. On April 8, 1998, judgment was entered against San Paolo in the amount of $1,705,000. San Paolo filed a timely notice of appeal from the judgment, and Simon filed a timely notice of cross-appeal.

DISCUSSION

I. San Paolo's Appeal

A. The First Trial

We leave our summary of the evidence adduced at the first trial to our discussion of Simon's cross-appeal because, although San Paolo contends that there was no substantial evidence to support any of the elements of fraud, it refers only to evidence presented during the second trial, which involved just the issue of punitive damages. San Paolo's opening brief and reply brief have set forth none of the evidence presented at that first trial.

It is presumed that the record contains evidence to sustain every finding of fact, and it is the appellant's burden to demonstrate the absence of substantial evidence to support a challenged finding, by setting forth all the material evidence on the point. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; Cal. Rules of Court, rule 13.) Since San Paolo has failed to do so, we presume the evidence was sufficient to support the verdict, and deem the point waived. (See *Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881.)

San Paolo also contends that there was no liability for fraud as a matter of law, because the jury found there was no contract. San Paolo's contention appears to be based

entirely upon its interpretation of the special verdict finding that there was no "binding and enforceable agreement" between the parties. San Paolo infers that the jury found that no contract had been formed in the first instance. Thus, it reasons, Simon was not induced to enter into a transaction, and cannot be said to have relied upon the false promise.

However, the jury was never asked to determine whether a contract had been formed. Instead, it was asked to make the legal conclusion as to whether an enforceable contract existed. Further, the use of "and" instead of "or" to connect "binding" and "enforceable" indicates the jury may have found that a contract had been formed, but was not enforceable, or that no contract had been formed at all. It is impossible to discern from the special verdict which conclusion the jury made.

A special verdict must call for ultimate facts, not conclusions of law. (Code Civ. Proc., § 624; see 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 355, p. 404.) And it must state those facts directly, not by implication. (*Breeze v. Doyle* (1861) 19 Cal. 101, 103.) The special verdict in this case was defective, in that it called for a conclusion of law, which merely implied the facts upon which it was based. The jury's finding of fraud implies that it found that the parties did enter into a contract, but the contract was unenforceable. We cannot conclude that the jury found that no contract was formed in the first instance.

San Paolo is, in effect, inviting us to infer a contradictory finding, while rejecting a reasonable interpretation which would support the judgment. However, San Paolo has waived any error in the form of the special verdict, by failing to object. (*Brokaw v. Black-Foxe Military Institute* (1951) 37 Cal.2d 274, 280.) We therefore reject San Paolo's invitation.

A cause of action for promissory fraud requires proof of an unperformed promise, made about a material fact, without any intention of performing it, and with the intent to deceive the plaintiff or to induce him to enter into a transaction; and upon which the plaintiff justifiably relies to his injury. (*Muraoka v. Budget Rent-A-Car, Inc.* (1984) 160 Cal.App.3d 107, 119; Civ. Code, §§ 1572, subd. 4, 1709, 1710.) Liability does not depend upon whether the promise is ultimately enforceable as a contract. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "'If it is enforceable, the [plaintiff] . . . has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract.' [Citation.]" (*Id.*at p. 638, quoting Rest.2d Torts, § 530, subd. (1), com. c, p. 65; and citing *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 29.)

San Paolo relies upon *Maynes v. Angeles Mesa Land Co.* (1938) 10 Cal.2d 587, 589, and Justice Clark's dissent in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 832. Neither case touches upon the requirement, or lack of requirement, of an enforceable contract as an element of promissory fraud.[3] We therefore reject San Paolo's contention that there was no liability for fraud as a matter of law.

B. The Second Trial

We summarize the evidence in the light most favorable to Simon, as the prevailing party, and we give Simon the benefit of every reasonable inference and resolving conflicts

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[3] Indeed, *Egan* does not even involve a claim of promissory fraud. That portion of Justice Clarke's dissent to which San Paolo refers states merely that a careless mistake resulting from poor investigation is not malice, and does not support an award of punitive damages. (See 24 Cal.3d at p. 832.)

in support of the verdict. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)[4]

When Simon agreed to purchase from San Paolo the building located at 816 South Figueroa in Los Angeles for $1,100,000, he objected to a term in the seller's offer which would make the purchase agreement non-binding until close of escrow. San Paolo's broker, William Atha, agreed that the term was not normal, and prepared a draft letter of intent which stated that it would be binding. Although the draft letter of intent stated that it was binding, it also called for approval of the transaction by San Paolo's Los Angeles and New York offices, which was to be given no later than 3:00 p.m. on June 12, 1996.

In all, the draft letter of intent contained thirteen terms lettered A through M, including the price, terms of the financing to be provided, and deadlines for various acts. Simon agreed to Atha's suggestion to include a requirement that San Paolo negotiate only with Simon, so that "the rug didn't get pulled out again at the end," as it had been several times during the negotiations by Duane King, San Paolo's vice-president in charge of the sale of the building.[5]

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[4]Our summary differs significantly from San Paolo's, because San Paolo has chosen to draw all reasonable inferences in favor of its own position, and to disregard its obligation to set forth in its brief all the material evidence, not merely its own. (See *Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881.)

[5]On several occasions, King changed the terms of his offer after Simon had verbally accepted them. In April 1996, Simon asked King what it would take to buy the building, and King told him that if he offered $1,290,000, the bank would finance the property for him, and give him $40,000 improvement allowance. As soon as Simon agreed, King demanded $1,350,000, and offered a $75,000 allowance. When Simon agreed to those terms, King said he would take the offer to New York, but Simon never heard back from him. Later that month, Simon learned that the prior owners had a right of redemption in the property, with eight or nine more months to run. Simon was very concerned about

Atha worded the requirement as follows: "Seller and Buyer agree to exclusively negotiate upon execution of this letter." Simon was told that minor "housekeeping terms" would be worked out in escrow.

The next day, June 12, 1996, Atha sent the final letter of intent for Simon's signature. It contained a few additional terms, now lettered A through P, and the word "binding" had been removed. However, the last paragraph stated: "These terms and conditions are the essential elements of this transaction and any minor modifications or further instructions shall be identified and reflected in escrow in the escrow instructions." A new term requiring a deposit receipt had been added. Concerned that the deposit receipt would not conform to the terms of the letter of intent, Simon added a provision to allow his attorney to approve the deposit receipt and escrow instructions.

The final letter of intent moved back the deadline for approval by the Los Angeles and New York offices of San Paolo Bank, to June 13, 1996. Upon receipt of such approval in writing, Simon was to deposit $50,000 to open escrow. He was to make his financial statements available within twenty-four hours after execution of the letter of intent. Simon signed the final letter of intent, and it was sent to King for signature. Shortly past noon on June 12, Atha told Simon that King had signed it, and added, "We have a deal." Atha faxed the fully executed letter of intent to Simon that evening (although he dated the fax cover sheet, "6-11-96"), and in the subject line of the cover sheet, after

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the possibility of redemption, so he offered $1.1 million conditioned upon a six-month escrow. Atha told him King would agree to the long escrow, if he agreed to pay $1.2 million. However, when they met to close the deal, King changed his offer again, demanding to close escrow by June 28, 1996, unless Simon paid $1.35 million. Negotiations broke off until June 10, 1996.

the words, "Signed Letter of Intent," he wrote in parentheses the word, "nonbinding."

The very same day that he signed the letter of intent, King told Atha that the bank had refused to agree to allow Simon until June 26 to finish his inspections, but would approve it if he completed them by June 21. In fact, he had not talked to New York before making this new demand, and never sought approval of Simon's purchase from anyone with authority to give it in New York. When Simon did not agree to move the date up earlier than June 24, King instructed Atha to refuse to accept Simon's financial statements and deposit. King told his supervisor that Simon had failed to perform, but he did not disclose to him that he had refused to accept Simon's documents and deposit.

On June 12, 13, and 14, without Simon's knowledge, King had been in frequent telephone communication concerning the subject property, with Robert Devogelaere, a business acquaintance of King's, and a mutual client of San Paolo's outside counsel, Richard Scott, with whom King also had several telephone conversations during the same period. On June 13, King told Atha not to disclose to Simon that he had another offer, or that he was negotiating with another buyer.

Also on June 13, Simon retained attorney Donald Mitchell, who spoke to Atha and King in a conference call the same day, demanding that San Paolo comply with the agreement. That evening, King faxed Simon a letter stating that he was terminating negotiations with him. Simon found the fax the next morning, June 14, when he arrived at his office. Also on June 14, King obtained formal approval for a sale to Devogelaere, and escrow opened same day.

On June 17, 1996, without disclosing the Devogelaere deal, King agreed to accept June 26 as the deadline for Simon to complete his inspections, as called for in the letter

of intent, and offered to discount the purchase price by $5000, to defray Simon's inspection costs. However, later that day, he said he would need approval from Italy, and that he would accept only $1,500,000. Soon after that, both King and Atha stopped taking Simon's calls.

1. San Paolo has failed to show an abuse of discretion in denying its motions in limine to exclude evidence.

San Paolo contends that the trial court should have granted its motions in limine to exclude evidence of certain trust deeds and liens recorded after the sale of the property, as well as all testimony by Simon's expert, and any testimony relating to compensatory damages which were not awarded in the first trial. The trial court should have excluded the evidence, San Paolo reasons, because it "was inadmissible and likely misled or confused the jury as to the real issues in the case."

The only authorities cited in support of this assignment of error relate generally to a trial court's discretion under Evidence Code section 352. (See e.g. *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 36 ["The trial court is vested with the discretion to exclude evidence which may unduly consume time or confuse the jury"]; *Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 619 ["The court could . . . properly conclude that . . . probative value was outweighed by factors supporting exclusion."].)

We infer from the cited authorities that San Paolo's contention is not really that the evidence was inadmissible per se, but that the trial court abused its discretion under Evidence Code section 352, in refusing to exclude it. The burden is on a party complaining of the trial court's exercise of discretion to show a clear case of abuse. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) An appellant may not carry this burden simply by inviting the appellate court to have a different opinion of the relevance of the

disputed evidence, as San Paolo has done here. (*Fontana Paving, Inc. v. Knecht, Garrison & Tait Associates, Inc.* (1965) 238 Cal.App.2d 724, 726.)

Not only is San Paolo required to demonstrate affirmatively an abuse of discretion, it is required to show that such abuse was " 'sufficiently grave to amount to a manifest miscarriage of justice . . . .' [Citation.]" (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932.) In making such a showing, it is the duty of a party to support its arguments with appropriate references to the record. (Cal. Rules of Court, rule 15(a).) San Paolo's references to the record are limited to the pages where its motions in limine are reproduced.

San Paolo fails to identify the exhibits or even to refer to the page numbers where we might find the evidence that it claims was admitted over its objection. Further, it fails to refer to the trial court's ruling on its objections, and it fails to refer to or discuss any testimony or other evidence to show how it was prejudiced by the unidentified trust deed and liens and unidentified testimony; and it fails to support its contention with applicable authority. We therefore deem this point abandoned. (See *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

2. Malice, oppression, or fraud was established in the first trial

Referring only to evidence adduced in the second trial, San Paolo complains Simon failed to establish fraud, oppression, or malice by clear and convincing evidence. San Paolo has apparently forgotten that by special verdict, the jury in the first trial expressly found, by clear and convincing evidence, that San Paolo had accomplished its fraud by means of fraud, oppression, or malice. The only issue in the second trial was the amount of punitive damages to be awarded.

3. San Paolo has not preserved misconduct issues for appeal

With no citation to authority, and very little argument, San Paolo contends that Simon's counsel made an improper closing argument, and provides six examples of comments which it contends to have been inflammatory, incorrect, misleading, or baseless.

Except in extreme cases, a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. (*Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) San Paolo does not contend that it made any such objection or request, and our review of counsel's argument has turned up none.

A party is deemed to have waived misconduct unless "it was of such an egregious nature that it could not have been cured by a corrective instruction to the jury. [¶] . . . Only misconduct so prejudicial that an admonishment would be ineffective excuses the failure to request such admonishment. [Citation.]" (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 892.)

San Paolo contends that it refrained from objecting or requesting an admonition because "the trial court specifically instructed the parties not to object or otherwise interrupt the other side's closing argument." Thus, San Paolo reasons, it "did not have the opportunity to challenge . . . inappropriate argument at the time it occurred." The trial court gave no such instruction. In reality, the court admonished counsel that it did not want to hear objections based upon a claim that the evidence does not support the argument.

San Paolo suggests that because the statements by Simon's counsel were outrageous on their face, prejudice is obvious. Error is not presumed; it is the appellant's burden

to show that the error complained of has resulted in a miscarriage of justice. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) "No judgment shall be set aside, or new trial granted, in any cause, . . . or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art.6, § 13.) A miscarriage of justice is shown only when it appears reasonably probable that a result more favorable to the appellant would have been obtained, were it not for the error. (*People v. Watson* (1956) 46 Cal.2d 818, 834-838.)

San Paolo has made no showing that a proper objection or request for admonishment would not have been effective. It has taken the alleged misconduct out of context, and not discussed the evidence in relation to counsel's argument. Indeed, the only references to the record are to counsel's statements. Thus, even if the failure to object or to request admonishment were excused due to the nature of the comments, San Paolo has utterly failed to demonstrate any prejudice from the comments.

4. Substantial evidence established that a corporate officer committed the act of oppression, fraud, or malice

San Paolo contends that because the fraud was committed by its employee, Simon was required to present some evidence relating to ratification, authorization, or advance knowledge of the employee's unfitness. In support of this contention, San Paolo relies upon the first sentence of Civil Code section 3294, subdivision (b): "An employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights

or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." San Paolo ignores the second sentence of subdivision (b) of Civil Code section 3294: "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

The evidence established that San Paolo is a corporation, and King was an officer of the corporation, with authority to sell property on behalf of the corporation. Thus, the "act of oppression, fraud, or malice [was] on the part of an officer," satisfying the requirements of the statute.

5. The award did not violate due process

San Paolo contends that the punitive-damage award was so excessive as to violate its right of due process under the federal constitution. San Paolo also contends the award was so disproportionate as to be presumptively the result of passion and prejudice, when analyzed under the criteria established under California law.

Punitive damage awards which are grossly excessive in relation to a State's legitimate interests in punishing unlawful conduct and deterring its repetition, violate a defendant's right to due process, guaranteed under the Fourteenth Amendment. (*BMW of North America v. Gore* (1996) 517 U.S. 559, 568.)[6] The Supreme Court has

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[6] Supreme Court decisions prior to *BMW* concerned the propriety of state procedures and the review necessary to ensure due process, but stopped short of formulating a test. (E.g., *TXO Production Corp. v. Alliance Resources Co.* (1993) 509 U.S. 443, 454-456; *Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, 22.) California law affords the degree of procedural due-process protection required under *Haslip*. (See *Las Palmas Associates v. Las Palmas Center Associates*

suggested some "guideposts" in determining whether an award is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm and the punitive damages award; and the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. (*Id.* at p. 574.)

Under California law, the essential question is whether the amount of damages awarded substantially serves the societal interest in punishing the wrongdoer and deterring similar misconduct; and the answer to that question is obtained by considering three factors: the reprehensibility of the defendant's conduct; the relationship between the punitive damage award and the harm done; and the amount of the punitive damage award in proportion to the defendant's wealth. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

The *BMW* guidelines are nearly identical, and serve the same purpose as California's criteria; thus, an award which passes muster under California's rules will satisfy the requirements for federal due process. (See *Sierra Club Foundation v. Graham, supra,* 72 Cal.App.4th at pp. 1160-1163.) Since San Paolo has not addressed *BMW's* third guideline, which suggests a review of civil penalties authorized or imposed in comparable cases, we shall analyze both contentions under the factors first set forth by the California Supreme Court in *Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at page 928.[7]

(1991) 235 Cal.App.3d 1220, 1257, 1258, fn. 8.) *TXO* did not add to those requirements. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15.) Thus, California's procedures are constitutionally sufficient after *TXO*, as well.

[7] Indeed, San Paolo has objected to Simon's attempt to compare the award to civil penalties provided for deceptive trade practices and

Awarding punitive damages in fraud cases furthers California public policy of punishing the defendant and making an example, in order to discourage the defendant and others from perpetrating fraud in the future. (*Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d at p. 1258; Civ. Code, § 3294, subd.(a).) If the award exceeds the amount needed to accomplish that goal, an appellate court can infer that the jury acted out of passion and prejudice. (*Id.* at p. 1259.) When the award is grossly disproportionate to the statutory objective, a presumption arises that it resulted from passion and prejudice. (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.) To make that determination, we are guided by the three Neal factors which we have already enumerated. (See *id.* at p. 928.)

San Paolo calculates the proportion of punitive damages awarded to actual harm as 340/1. It contends that with a ratio of more than five to one, the award should be deemed excessive, requiring reversal. There is no fixed ratio of punitive damages to harm which results in a presumption of passion and prejudice; however, "even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. [Citation.]" (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.)

San Paolo's calculation of 340/1 is the proportion of punitive damages, $1,700,000, to Simon's out-of-pocket expenses of $5000, awarded pursuant to Civil Code section 3343, subdivision (a)(1). In calculating this ratio, San Paolo relies upon its own assumption that the law requires a comparison of the actual amount awarded by the jury as compensatory damages, with the amount of the

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perjury, on the ground that it has not been charged with such offenses, although there is nothing in *BMW* which would limit consideration of comparable civil and criminal penalties to charged offenses.

punitive damage award. As we shall explain, San Paolo's assumption is unfounded.

Ordinarily, one who has been fraudulently induced to enter into an unenforceable contract may recover the benefit of the bargain, as well as out-of-pocket expenses. (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 638.) However, a defrauded purchaser of real property, who does not succeed in acquiring the property, may recover only his or her out-of-pocket losses, not benefit-of-the- bargain damages. (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 54; Civ. Code, § 3343.)

That does not mean that Simon did not suffer injury due to the loss of his bargain. Simon agreed to purchase the building for $1,100,000. His expert appraised the building's value as $1,500,000, as had San Paolo's expert before the action was filed. Simon's loss was at least the $400,000 difference between the appraised value and the price at which King falsely promised to sell the building.[8]

Although the compensatory damage award is usually a convenient measure of the injury or damages suffered by a plaintiff, it may or may not reflect the actual harm the plaintiff has suffered. (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1603-1604.) "Thus, to meaningfully apply the 'reasonable relation' rule, the trier of fact (and reviewing court) should not focus on some

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[8]Simon also lost a unique opportunity. Small office buildings rarely come on the market in the location of the subject five-story office building, and Simon found it to be perfect for his paper and printing business, partly because it would enable him to compete better with the large suppliers like Staples, Office Depot, and Xerox. The building itself was also ideal, because it had a finished basement with a large, industrial-size freight elevator, which he found to be perfect for his warehouse. He planned to use the second floor, and lease out the top three floors, which had fancy improvements, making them attractive to potential tenants.

bottom-line amount of an award of compensatory damages but on the nature and degree of the actual harm suffered by the plaintiff. . . ." (*Id.* at p. 1604; *Carr v. Progressive Casualty Ins. Co.* (1984) 152 Cal.App.3d 881, 892; cf, *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 541; but see *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1190 [expenditures required by law are not damages, and may not be considered in awarding punitive damages].)[9]

When the actual harm to Simon is considered, its ratio to punitive damages is not 340 to 1, but just over 4 to 1, not grossly disproportionate, without consideration of other factors, as to suggest passion or prejudice. Thus, we measure the reprehensibility of San Paolo's conduct against a ratio of 4 to 1, not 340 to 1.

Discussing only evidence favorable to its position, San Paolo contends that its conduct was not "particularly reprehensible," because it caused only nominal economic harm and was a single act. Further, since King is no longer employed by San Paolo, it contends that such conduct was unlikely to recur.

San Paolo misapprehends the scope of review. We must view the entire record for substantial evidence from which the jury could reasonably conclude that the acts of San Paolo reached the level of reprehensibility to justify the award. (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at pp. 922, 927.) An appellate court's task is not to find

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[9]Nor does the Due Process Clause of the Fourteenth Amendment require comparison with a fixed ratio based upon the compensatory-damage award. "It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as . the possible harm to other victims that might have resulted if similar future behavior were not deterred." (*TXO Production Corp. v. Alliance Resources Corp., supra,* 509 U.S. at p. 460.)

evidence from which inferences may be drawn in the appellant's favor, as San Paolo has done, but "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Crawford v. Southern Pacific Co., supra,* 3 Cal.2d at p. 429.)

Substantial evidence not only supports the verdict, but also contradicts San Paolo's conclusion that the fraud was an isolated incident. King engaged not in one act of deception, as San Paolo urges, but in a pattern of deceit that continued into his trial testimony. He deceived not only Simon, but also Atha, concealing the Devogelaere deal, and leading Atha to believe he was still negotiating in good faith after the Devogelaere deal had already gone into escrow. Further, King never disclosed his agreement with Simon to Devogelaere. King deceived his own supervisor, as well, telling him that Simon had failed to produce financial records, without disclosing that he had refused to accept them.

San Paolo seeks to draw an analogy with the facts of *FDIC v. Hamilton* (10th Cir.1997) 122 F.3d 854, where a mitigating factor considered by the federal court was the fact that the fraud was a "single contractual event," even though the scheme took some time. (122 F.3d at p. 862.)[10] While we do not disagree with San Paolo's assertion that such facts are relevant to determining the degree of reprehensibility, we must consider all the relevant facts. (*Adams v. Murakami, supra,* 54. Cal.3d at p. 110.)

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[10]San Paolo also relies upon an unpublished California case, without compliance with California Rules of Court, rule 977. (See e.g., *Cates Construction, Inc. v. Talbot Partners* (1997) previously published at 53 Cal.App.4th 1420, superseded by *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28.) We will disregard the reference.

King's deceit is not so easily dismissed as an isolated incident. It was continuous and intricate. After this action was filed, King filed two false declarations claiming to have had no communication with Devogelaere concerning the property until the evening of June 13. At trial, faced with his own telephone records, King claimed the declarations were true, although he should not have used the word," communicate," because what he really meant was that he did not *negotiate* with Devogelaere.

King then came up with a palpably unbelievable story to support his claim that he did not negotiate with Devogelaere prior to the evening of June 13. King testified that Devogelaere dropped his offer off at his home that evening, and he signed it the morning of June 14 at 8:00 a.m.[11] However, the offer, made on a pre-printed deposit-receipt form, was filled out in purple ink, dated June 12, 1996, in purple ink, and signed by both King and Devogelaere in purple ink, although King's signature was written in both blue ink and purple ink, one signature directly over the other. King initialed each page in blue ink. The date was changed from June 12, 1996 to June 14, 1996, by writing "14" over the "12." King claimed that the original date had been recorded wrong, and had to be changed; and that because the document had multiple copies, it was necessary to write over his signature to make it show on all of them. He also claimed that Devogelaere had left his purple pen with the document.

King testified that after he signed the document at 8:00 a.m., he drove four miles to Devogelaere's home in Pacific Palisades, dropped it in the mailbox, then drove to his office

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[11] King testified in deposition that he did not see the offer until June 14, but he changed that testimony by writing on the transcript that Devogelaere dropped it off at his home the evening of June 13, and that he did not look at it until the next day. In deposition, he testified he signed it at home on his dining-room table, but at trial, it was in his car.

in downtown Los Angeles, arriving by 8:34 a.m.,[12] when he had a telephone conversation in his office, before preparing a memorandum regarding the sale to his supervisor, Who then prepared another memorandum, dated June 13, 1996, which was faxed to New York at 9:15 a.m. that morning, June 14, 1996.

We reject San Paolo's suggestion that the jury was not permitted to consider King's apparently false testimony, because it would amount to a sanction for litigation misconduct, instead of punishment for the conduct which precipitated the lawsuit. We agree that the defendant's behavior at trial may not be the basis of the jury's award. (Cf., *Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 500-501.) However, King's false testimony was more than litigation misconduct. It showed how he manipulated the parties and documents at the time of the events in mid-June 1996 in order to support his false claim that he complied with the terms of the letter of intent, and its claim that it was Simon who failed to perform. King's deception at trial showed how false he was prior to trial, and thus, how reprehensible his conduct was.

Substantial evidence also contradicts San Paolo's assertion that it is unlikely to engage in similar wrongdoing in the future because King is no longer employed by San Paolo. San Paolo did not terminate Kings employment, or distance itself in any way from King's conduct. King was never reprimanded, warned, or counseled; he suffered no job or salary action whatsoever, and even got a bonus that year. The jury could reasonably have concluded that it is unlikely that San Paolo will change its policies to discourage similar conduct in the future.

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[12]Simon had King's telephone records, showing that he made a call from his office at 8:34 a.m. Devogelaere testified that it takes at least 35 minutes to reach downtown Los Angeles from his home, when there is no traffic, and up to 1½ hours with traffic. June 14, 1996, was a Friday.

"Trickery and deceit" are reprehensible wrongs, especially when done intentionally through affirmative acts of misconduct. (*TXO Production Corp. v. Alliance Resources Corp., supra,* 509 U.S. at p. 462.) Our review of the entire record does not compel a conclusion that the award was so grossly disproportionate to the degree of reprehensibility or to the harm done, as to raise the presumption that it was the result of passion and prejudice. Having so concluded, we turn to San Paolo's contentions regarding wealth.

" 'Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence . . . , will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. . . . By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.' [Citation.]" (*Adams v. Murakami, supra,* 54 Cal.3d at p. 110, citing *Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.)

San Paolo contends that Simon's counsel "invited error" in his closing argument by ignoring the first two "prongs of the test" and arguing "almost exclusively on the wealth of San Paolo."[13] Its reasoning is somewhat difficult to follow, but appears to be a contention that Simon was required to include a discussion of all three *Neal* factors in his closing argument, without emphasizing one over the other, and that he was prohibited from suggesting a particular amount that the jury should award.

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[13]The doctrine of invited error estops an appellant who has induced the commission of error, from asserting it as a ground for reversal. (See 9 Witkin, Cal. Proc. (4th ed. 1997) Appeal, § 383, p. 434) It is not a ground for reversal. (See 2 Cal. Evidence (3d ed. 1986) § 1371, p. 1335.)

San Paolo has cited no authority for its assertions, not even general authority concerning the limitations placed on argument. Even if we assume that it was misconduct for counsel to suggest an amount or to fail to emphasize all three *Neal* factors equally, San Paolo does not claim to have objected to the argument or to have requested an admonishment. We therefore pass on these contentions without consideration. (See *Horn v. Atchison, T. & S.F. Ry. Co., supra,* 61 Cal.2d at p. 610.)

Substantial evidence supports a finding that San Paolo's net worth was between $40,000,000 and $50,000,000. Bob Wurster, an officer of both San Paolo and its parent and sole shareholder, San Paolo Bank, testified that at the end of 1996, the net assets of San Paolo were approximately $46,000,000; and that at the end of the first trial the net assets of San Paolo were approximately $55,000,000. At less than five percent of San Paolo's net worth, the punitive damage award was not excessive on its face, without evidence that such a sum would cause such undue hardship as to render the punishment unreasonably disproportionate to San Paolo's ability to pay. (See *Adams v. Murakami, supra,* 54 Cal.3d at pp. 111-112.) It was San Paolo's burden to make such a showing. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1167.)

San Paolo did not make such a showing, and does not contend here that the amount is unreasonably disproportionate to its ability to pay. It contends in its reply brief, for the first time, that the trial court should have excluded evidence that after the first trial, San Paolo transferred $40,000,000 to the bank.[14] Without such evidence, it reasons, its net worth was shown at the time of

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[14] Wurster admitted that the transfer had been made after the first jury awarded punitive damages. He also admitted that he had attended the first trial, and knew that punitive damages would be the issue in the second trial.

the second trial to be only $4,875,000, which would not justify an award of $1,700,000, since punitive damages awards are generally limited to 10 percent or less of the defendant's net worth. (See *Weeks v. Baker & McKenzie, supra,* 63 Cal.App.4th at p. 1166.)

Ordinarily, a contention made for the first time in an appellant's reply brief may be disregarded, unless some meritorious reason is shown why it was not made in the opening brief. (*Monk v. Ehret* (1923) 192 Cal. 186, 190.) That rule is inapplicable if the new point is raised in order to address a contention in respondent's brief. (See *Fratessa v. Roffy* (1919) 40 Cal.App. 179, 188) In his respondent's brief, Simon discussed the guidelines set forth in *BMW of North America v. Gore, supra,* 517 U.S. at page 574, including the issue of the wealth of the defendant. The Burn of Simon's statement on the subject was as follows: "The wealth of a defendant must also be considered. [Citation.] San Paolo's wealth was appropriately considered to be $40,000,000 to $50,000,000. The jury could rightfully reject San Paolo's poverty plea based on its substantial liquid net worth and the questionable riming of the transfer of that net worth to the parent company."

We need not consider whether Simon's statement opens the door to a contention that the trial court should have excluded evidence of the transfer of assets, because once again, San Paolo fails to refer to its objection to the evidence, fails to refer to the trial court's ruling on its objections, and fails to refer to or discuss any testimony or other evidence to show how it was prejudiced by the evidence; and it fails to support its contention with applicable authority. We therefore deem the point abandoned. (See *Troensegaard v. Silvercrest Industries, Inc, supra,* 175 Cal.App.3d at p. 228.)

4. San Paolo waived any error with respect to BAJI No. 14.72.2

San Paolo contends that the jury instruction in BAJI No. 14.72.2 is so vague that its right to due process was infringed by the use of it. San Paolo does not refer to its objection to the instruction, if any, in the trial-court record, or to any clarifying instruction it may have proposed. Our review of the record reveals that the parties jointly requested BAJI No. 14.72.2.

It is a long-established rule that one may not complain of instructions given to a jury at his own request. (*Emerson v. County of Santa Clara* (1871) 40 Cal. 543.) Further, a party may not complain on appeal about an instruction which was correct, but incomplete or vague, unless he requested an additional or clarifying instruction in the trial court. (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9.) Since San Paolo does not contend that it requested an additional or clarifying instruction in the trial court, and we have found none in the record, San Paolo has not preserved this points for appeal, and we pass it without further consideration.

5. San Paolo's contentions regarding California law and criminal standards are too vague to address

San Paolo's final contention appears to be that all California law relating to punitive damages is "constitutionally vague," and the imposition of punitive damages should be governed by the same standards which apply to criminal penalties.

A challenge to a statute as vague in its entirety usually involves a review of the words of the enactment, its application in the particular case of the party challenging it, and finally, hypothetical applications of the law. (See *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 494-495, fn. 5.) San Paolo has made

no effort to make such an analysis, and has not even identified the specific "California law" to which it objects, or which criminal standards should apply.

Simon has understandably made no attempt to address this contention in his respondent's brief, and we decline San Paolo's apparent invitation to address the subject of vagueness and constitutionality in the abstract, except to point out that in general, California's procedures for the imposition of punitive damages have been held to comply with constitutional requirements of due process.[15] (See *Sierra Club Foundation v. Graham, supra,* 72 Cal.App.4th at pp. 1160-1163; *Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d at p. 1258, fn. 8.)

II. Simon's Cross-Appeal

A. Simon's proposed special verdict form was properly refused

The letter of intent signed by both parties provides, in part: "Seller and Buyer agree to exclusively negotiate upon execution of this letter." King admitted that San Paolo was bound by that term of the letter of intent, which prohibited him from negotiating, at least for 24 hours, with any other potential buyers.

Simon proposed a special verdict form which asked, "Did the defendant and plaintiff agree to exclusively negotiate with each other to complete the sale of the real property located at 816 South Figueroa Street, Los Angeles, California?" Simon contends that the trial court erred in refusing this question in favor of the special verdict as given, which asked, "Was there a binding and enforceable agreement between [San Paolo] and [Simon]?"

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[15] See footnote 6, above.

As we have discussed in relation to San Paolo's appeal, the special verdict form used was ambiguous, and called for a legal conclusion. Simon did not object to it on either of those grounds, and does not object to it here on those grounds, and we consider them waived. (See *Brokaw v. Black-Foxe Military Institute, supra,* 37 Cal.2d at p. 280.)

Whether to allow a more or less detailed special verdict form was within the trial court's discretion. (See *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1487.) A trial court abuses its discretion if the special verdict form fails to dispose of all elements of the cause of action. (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855.) As ambiguous as it was, the form which was used did not fail to dispose of the contract cause of action, and the proposed question regarding negotiation was subsumed in it. Had the jury found an enforceable agreement to negotiate exclusively with Simon, it would have properly answered that there was, in fact, an enforceable agreement.

The burden is on a party complaining of the trial court's exercise of discretion to show a clear case of abuse. (*Denham v. Superior Court, supra,* 2 Cal.3d at p. 566.) Further, Simon was required to show that any abuse was "'"sufficiently grave to amount to a manifest miscarriage of justice. . . ."' [Citation.]" (*Mission Imports, Inc. v. Superior Court, supra,* 31 Cal.3d at p. 932.) The jury found there was no enforceable contract. Simon has not suggested how the result would have been different if the jury had been asked more specifically whether there was a contract to negotiate exclusively. Nor has Simon provided any authority for his contentions. We therefore deem the point waived. (See *Troensegaard v. Silvercrest Industries, Inc., supra,* 175 Cal.App.3d at p. 228.)

B. Jury Instructions

Simon contends that if several jury instructions had not been refused by the trial court, the jury might have found the letter of intent, or at least part of it, to be an enforceable contract. A letter of intent which contains all essential terms may constitute an enforceable contract, depending on the parties' intent and their expectations. (See *California Food Service Corp. v. Great American Ins. Co.* (1982) 130 Cal.App.3d 892, 897.) Also depending upon the intent of the parties, a detailed letter of intent may be an agreement to negotiate in good faith. (See *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1033.)

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case. [Citations.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

To determine whether a theory is supported by substantial evidence we reverse the usual rule of appellate review, and review the evidence in the light most favorable to the appellant, in this case, the cross-appellant, Simon. (See *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.) Applying that standard, we agree that substantial evidence supports the formation of a contract.[16]

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[16]San Paolo devotes substantial energy to arguing that there was substantial evidence showing that the letter of intent was merely an agreement to agree (see *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 151), and that the parties did not intend to be bound until they signed a deposit receipt. (See *Gavina v. Smith* (1944) 25 Cal.2d 501, 504.) Whether substantial evidence supports the judgment is not, however, our inquiry; rather, it is whether substantial

After several months of on-again, off-again negotiation, San Paolo agreed to sell Simon the property located at 816 South Figueroa, for $1.1 million. Atha drafted a two-page letter of intent, which set forth all the terms which the parties had negotiated regarding the sale of the building. The first sentence of the draft letter of intent stated, "Due to the motivation of both parties and the anticipated short escrow, the following shall serve as a binding Letter of Intent for purpose of entering escrow. . . ."

On June 12, 1996, after the parties agreed to a few changes, Atha faxed to Simon a final version of the letter of intent, containing more than sixteen terms, with King's signature already affixed. One of the changes was made without Simon's knowledge: King had instructed Atha to remove the word, "binding," from the first sentence. However, it was still Simon's understanding that the letter of intent would be a binding contract, and that it contained all the essential terms of their contract. He was told that the only terms left to negotiate were "housekeeping" terms, which would be addressed in the escrow.[17]

Atha testified that he also thought the letter of intent was to be a binding contract, once it was approved by New York and escrow was opened, and he thought that it reflected all the essential terms of the parties' agreement.[18] Even though he took the word, "binding," out of the final draft at King's request, and described it on the cover sheet as "nonbinding" when he faxed Simon a copy of the fully executed letter of intent, he interpreted "nonbinding" as meaning only that the agreement was subject to approval by San Paolo's New

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evidence supports the requested instruction. (*O'Meara v. Swortfiguer* (1923) 191 Cal. 12, 15.)

[17] He did not say who told him.

[18] Atha changed this testimony in the second trial, claiming to have discussed the change to a non-binding letter of intent with Simon.

York office, and the opening of escrow.[19] The letter of intent stipulated that escrow was to open upon approval of the terms and conditions of the letter of intent by San Paolo's Los Angeles and New York offices, which would be given no later than 3:00 p.m. the next day. The evening of the day that the letter of intent was signed by both Simon and King, Atha told Simon, "We have a deal. Go home, sleep like a baby." King testified that although he did not intend the letter of intent to be binding, he considered himself bound by the promise not to negotiate with others.

We turn first to Simon's contention that since all parties intended to be bound by the letter of intent's exclusive-negotiation term, substantial evidence supports the existence of an agreement to negotiate in good faith, and the court should have given his proposed instruction on that issue.

That proposed instruction reads as follows: "A duty of good faith and fair dealing may exist even in an agreement that is not binding. Even if you determine that the letter of intent was not binding on the defendant to sell the subject property, you are not precluded from finding that the letter of intent was an agreement to use best efforts or to negotiate in good faith. If you determine that the letter of intent was an agreement to use best efforts or to negotiate in good faith to complete a sale of the property, and you further determine defendant failed to negotiate in good faith or to use best efforts to complete the sale or that the defendant breached the term of the agreement to exclusively negotiate with plaintiff, you may determine that here was breach of the implied covenant of good faith and fair dealing resulting in a breach of contract."

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[19] Simon received that fax after the letter of intent was fully executed, and did not read the cover sheet or notice that it contained the word, "nonbinding."

The determination of whether there existed an agreement to negotiate in good faith is made according to the ordinary rules of contract. (See *Racine & Laramie, Ltd. v. Department of Parks & Recreation, supra,* 11 Cal.App.4th at pp. 1033-1035.) The jury in this case was properly instructed on the rules of contract formation. Instructions which are cumulative or merely amplifications of other instructions should not be given. (*Hicks v. Ocean Shore Railroad, Inc.* (1941) 18 Cal.2d 773, 783.)

"Formula instructions," such as that proposed by Simon, are properly refused, unless they are reasonably brief and concise, and are accurate statements of the law, understandable to the average juror. (See *Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 763-764.) The proposed instruction is neither brief nor concise, and contains the misleading statement that "[a] duty of good faith and fair dealing may exist even in an agreement that is not binding," implying that a duty to negotiate in good faith may exist in the absence of one or more elements of contract. In fact, an agreement to negotiate in good faith must meet the requisites of an enforceable contract. (*Racine & Laramie, Ltd. v. Department of Parks & Recreation, supra,* 11 Cal.App.4th at p. 1033.) The trial court properly refused the instruction, and was not obligated to modify it or propose another in its place. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 717.)

Relying on *Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, and *Jacobs v. Freeman* (1980) 104 Cal.App.3d 177, Simon also contends that since substantial evidence supported the formation of a contract, subject to the approval of San Paolo's senior management in Los Angeles and New York, the jury should have been instructed as to San Paolo's obligation to seek such approval in good faith. Simon contends that if the jury had been

instructed as to San Paolo's obligation to exercise good faith in seeking approval, it might have found the letter of intent to be an enforceable contract.

In *Jacobs v. Freeman,* the parties' contract contained an express provision similar to one in the letter of intent, conditioning the opening of escrow upon approval by the seller's board of directors. The court of appeal reversed a nonsuit, holding that the provision was intended to be a condition precedent to the seller's duty to convey title to the land rather than a condition precedent to the formation of a contract. (104 Cal.App.3d at p. 189) The implied covenant of good faith and fair dealing required the seller's officers to submit the contract to the board of directors, and their failure to do so was a breach of contract. (*Id.* at pp. 189-190.)

Jacobs v. Tenneco West involved the same parties as in *Jacobs v. Freeman.* The seller appealed an adverse judgment upon retrial, contending that the buyer had failed to prove that it had acted in bad faith in failing to submit the contract to the board. (*Jacobs v. Tenneco West, Inc., supra,* 186 Cal.App.3d at p. 1415, 1418.) The court held that since the buyers did not assume the risk of lack of cooperation, and the lack of cooperation was not shown to be justifiable, the seller bore the burden to establish that its failure did not contribute materially to the nonoccurrence of the condition. (*Id.* at p. 1418) When seller then responded that the board would not have approved the contract in any case, the court held that such an excuse for nonperformance is an affirmative defense, upon which the seller had the burden of proof. (*Id.* at p. 1419.)

Here, San Paolo interposed no such affirmative defense. However, in his closing statement, its counsel argued that even if the parties intended the letter of intent to be a binding 'contract, it was unenforceable because conditions were not met, including the requirement of approval from

New York, and the opening of escrow, which was, in turn, conditioned upon approval from New York. Nevertheless, King admitted that he never submitted the letter of intent or Simon's offer for approval. Further, although San Paolo's approval procedure required the recommendation of King's supervisor, William Schack, then the submission of a written memorandum to one of two officers in New York, King never submitted anything to them, and never asked for Schack's recommendation.

Simon contends that under the rationale of the two *Jacobs* holdings, San Paolo was estopped to argue that the sale was not or would not have been approved by New York. However, Simon did not object to counsel's argument; nor did he seek a ruling from the trial court on his estoppel theory. Instead, he proposed four lengthy, rambling, argumentative, and confusing instructions, and an instruction on the implied covenant of good faith and fair dealing.[20] The form of the proposed instructions alone

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[20] Proposed instruction number 4 reads in part: "In this case, the agreement between plaintiff and defendant gave defendant the right to seek written approval of the . . . New York offices. . . . If you determine that (1) the defendant sought written approval . . . and (2) that the senior officers rejected the terms and conditions of the contract reasonably and in good faith, you may determine that the contract is not enforceable. However, if you determine that the defendant failed to seek written approval . . . , the condition is excused . . . and may be determined by you not to prevent the formation of a binding contract. . . . " Number 5 states: "If you determine that the individuals negotiating with the plaintiff . . . had an obligation to seek approval from . . . New York . . . , you must determine that such individuals had a duty to submit the contract with a recommendation of approval. If you find that they did not recommend approval of the terms of the contract . . . , you may determine that their failure was an unreasonable prevention of the performance of the condition which excused the condition if you also determine that the failure to recommend the terms and conditions of the Letter of Intent contributed materially to the failure to obtain such approvals, you may conclude that there was a

justified their refusal. (See *Dodge v. San Diego Electric Ry. Co., supra,* 92 Cal.App.2d at pp. 763-764.)

The proposed instructions are also ambiguous. On the one hand, they appear to assume that New York's approval was a condition precedent to the formation of a contract. At the same time, the proposed instructions appear to instruct the jury to assume that a contract had been formed, and San Paolo's performance was conditioned upon New York approval.

A covenant of good faith and fair dealing is implied in all contracts. (See *Universal Sales Corp. v. California etc. Mfg. Co.* (1942) 20 Cal.2d 751, 771.) However, it is not implied if no contract has been Armed, and does not require a party to enter into a contract. (*Racine & Laramie, Ltd. v. Department of Parks & Recreation, supra,* 11 Cal.App.4th at p. 1032.) Neither *Jacobs v. Freeman,* nor *Jacobs v. Tenneco*

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breach of the contract." Number 6 reads: "Under the terms of the contract, defendant was obligated to open escrow and attempt to complete the sale of the property only if the terms and conditions of the letter of intent were approved, in writing, by . . . New York. . . . However, the implied covenant of good faith and fair dealing also required defendant to make reasonable efforts to obtain the approval . . . , and if it failed to do so, the law does not permit it to take advantage of that failure to avoid an obligation to sell the property. Consequently, if the failure to obtain written approval . . . was caused by defendant's failure to make reasonable efforts to obtain such approval, then the defendant is obligated to plaintiff in the same manner as if the senior officers had approved . . . the letter of intent." Number 7 states: "If you find that the defendant made reasonable efforts to obtain such approval, you may find that[it]had no obligation under the contract to sell the property. On the other hand, if you find that the defendant failed to make reasonable efforts to obtain the approval . . . , you must find that [it] is obligated to plaintiff in the same manner as if they obtained such approval. Unless defendant proves, by a preponderance of the evidence, that the senior officers would not have given its approval, even if they had made reasonable efforts to obtain such approval, you may determine that defendant is deemed to have approved the terms and conditions of the letter of intent."

West held otherwise. In those cases, there was no issue concerning the formation of a contract. There, an executory bilateral contract to sell the land had been created, obligating the seller to convey land upon board approval. (*Jacobs v. Freeman, supra,* 104 Cal.App.3d at p. 187.) Board approval was not a condition precedent to the formation of the contract. (*Jacobs v. Tenneco West, Inc., supra,* 186 Cal.App.3d at p. 1415) Thus, to the extent the instructions suggest that San Paolo was required by the covenant of good faith and fair dealing to bring about a condition precedent to the formation of the contract, they are not supported by those authorities, and they were incorrect.

Further, since San Paolo did not interpose the affirmative defense of excuse of a condition precedent to its performance, the court was not required to instruct as to the burden of proof discussed in *Jacobs v. Tenneco West, Inc., supra,* 186 Cal.App.3d at pages 1418-1419. Thus, the trial court properly refused the entirety of the instructions, and had no duty to cull out what was proper, modify them, or give others in lieu of them. (See *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, supra,* 227 Cal.App.2d at p. 717.)

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

Not to be Published

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

APPENDIX 3

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 4

DATE: September 21, 2000

Beth Ann R. Young
Epport & Richman, LLP
10100 Santa Monica Blvd.
Suite 1450
Los Angeles, CA 90067-4118

SIMON, LIONEL
Plaintiff-Respondent-Appellant
v.
SAN PAOLO BANK
Defendant-Appellant-Respondent

B121917

Los Angeles County No. BC152431

THE COURT:

Petition for Rehearing is denied.

APPENDIX 4

SUPREME COURT
FILED
NOVEMBER 27, 2000
FREDERICK K. OHLRICH, CLERK
DEPUTY

Court of Appeal, Second Appellate District,
Division Four - No. B121917
S092092

IN THE SUPREME COURT OF CALIFORNIA

LIONEL SIMON,
Plaintiff and Respondent,
v.
SAN PAOLO U.S. HOLDING COMPANY INCORPORATED,
Defendant and Appellant.

The time for granting or denying review in the above-entitled matter is hereby extended to and including January 4, 2001, or the date upon which review is either granted or denied.

/s/ GEORGE
Chief Justice

APPENDIX 5

SUPREME COURT
FILED
DECEMBER 13, 2000
FREDERICK K. OHLRICH, CLERK
DEPUTY

Court of Appeal, Second Appellate District,
Division Four - No. B121917
S092092

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LIONEL SIMON,
Plaintiff and Respondent,
v.
SAN PAOLO U.S. HOLDING COMPANY INCORPORATED,
Defendant and Appellant.

Petition for review DENIED.

/s/ GEORGE
Chief Justice

APPENDIX 6

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

LIONEL SIMON,
Plaintiff, Respondent and Cross-Appellant,
v.
SAN PAOLO U.S. HOLDING COMPANY, INC.,
Defendant, Appellant and Cross-Respondent.

B121917

(Super. Ct. No. BC152431)

ORDER

COURT OF APPEAL — SECOND DIST.
FILED
JANUARY 10, 2001
JOSEPH A. LANE, CLERK
J. GUZMAN, DEPUTY CLERK

THE COURT:*

The court has received and considered the motion to recall the remittitur issued December 18, 2000, and that issuance be stayed pending the filing of a petition for a writ of certiorari with the United States Supreme Court filed by defendant San Paolo U.S. Holding Company, Inc., on December 26, 2000. The court has also received and considered the opposition to defendant's motion filed on January 5, 2001, by plaintiff Lionel Simon, doing business as Liberty Paper Company.

Good cause appearing, it is ordered that the remittitur issued on December 18, 2000, is recalled and shall be stayed for 90 days from the date of this order at which time it will terminate and the matter will be remanded to the trial court.

The bond filed pursuant to Code of Civil Procedure in the amount of $2,557,500 may be deficient to pay the principal amount of the judgment and the accrued interest. Therefore, defendant may apply to the United States Supreme Court for any further stay. This order is made without prejudice to plaintiff to apply for additional security on a showing that the present bond is substantially inadequate to protect his interest pending the 90-day stay granted to defendant, inadequate to protect his interest pending the 90-day stay granted to defendant.

/s/ C.S. VOGEL

*VOGEL (C.S.), P.J.

FILED
APR 19 2001
OFFICE OF THE CLERK

(2)

No. 00-1457

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner,

v.

LIONEL SIMON d.b.a. LIBERTY PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FOUR

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

(i) Is certiorari appropriate to review a punitive damage award where the state appellate court expressly held under California law — after de novo review by the trial court — that the ratio of actual harm to punitive damages was only 4:1 *not* 340:1 and which does not involve any unsettled issues of Constitutional law?

(ii) Is certiorari appropriate to review a fact specific, non-published, opinion of a state intermediary court, on a case that affects only the instant litigants and presents no tangible conflict of law, in essence providing only an advisory opinion?

(iii) Is certiorari appropriate where the petitioner fails to provide the Court with a full and complete record of the evidence presented in the two trials, just as petitioner failed to do before the California Court of Appeal?

(iv) Whether Supreme Court review is appropriate where the evidence in two separate jury trials established fraud by clear and convincing evidence; that the fraud was committed with malice, oppression and fraud; that there was a repeated intricate practice of trickery, deceit and perjury; and where the state appellate court specifically found that the award did not violate due process considerations under the guidelines of this Court's decision in *BMW of North of America Inc. v. Gore*?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings include respondent, LIONEL SIMON, doing business as LIBERTY PAPER COMPANY. Liberty Paper Company is a trade name for Lionel Simon.

STATEMENT PURSUANT TO RULE 29.6

Rule 29.6 is inapplicable, because respondent Lionel Simon is an individual.

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Plaintiff/Respondent LIONEL SIMON d.b.a. LIBERTY PAPER COMPANY ("Simon") respectfully submits this brief in opposition to the petition for Writ of Certiorari filed by defendant and petitioner SAN PAOLO U.S. HOLDING COMPANY, INC. ("San Paolo"), in which it is seeking review of the California Court of Appeal's unpublished decision in *Simon v. San Paolo* case number B121917 (California Court of Appeal, August 28, 2000) and from the denial of the petition for review by the California Supreme Court, which denial was rendered en banc pursuant to case number S092092.

Appellate review followed two jury trials and corresponding motions for new trial, the first granted and the second denied, where the trial judge evaluated the evidence on a de novo standard pursuant to California Code of Civil Procedure § 657. *Tice v. Kaiser Co.*, 102 Cal. App. 2d 44, 46, 226 P.2d 624, 625 (1951).

After an express finding by the first jury that there was "clear and convincing" evidence of fraud, malice, and oppression, the second jury properly considered all of the evidence bearing on harm to Simon, which totaled over $400,000, and that he was unlawfully and fraudulently divested of his exclusive right to buy a unique office building that was needed for the future of his small printing and paper supply business. With consideration of the total harm, not just some bottom line number reflecting his out of pocket damages, the ratio of actual harm to punitive damages was just over 4 to 1. The Court of Appeal held that this was the correct ratio under California law and specifically rejected Petitioner's 340 to 1 concept. (Pet. A-31.)[1]

The evidence also demonstrated that San Paolo's senior officers were involved in the fraud by a "continuous and

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1. All references to "Pet." are to the Appendix attached to the Petition.

intricate" plan of trickery, deceit and perjury which was intentionally designed to deprive Simon of his exclusive right to complete the purchase of the building.

As stated herein, this case presents no authentic conflict of law, no unsettled question regarding due process and no new Constitutional issues for this Court to address. Since at least 1989, in *Gagnon v. Continental Casualty Company*, 211 Cal. App. 3d 1589, 1602, 260 Cal. Rptr. 305 (1989), California has been considering basically the same Constitutional safeguards that this Court ultimately adopted as "guideposts" in *BMW of North America v. Gore*, 517 U.S. 559 (1996). The state Court of Appeal adequately and thoroughly evaluated the entire record under the BMW guidelines — after de novo review by the trial court — and determined that there was no violation of due process.

Further, San Paolo has failed to demonstrate that California's procedures are in actual conflict with any other state or Federal Court. San Paolo has not offered any example of how the ruling in this state is problematic for any other litigant or tribunal. No examples are pointed out by San Paolo as to any genuine conflict. Simply repeating Constitutional buzzwords should not be enough to gain the privilege of Supreme Court review. Absent any real discernible conflict, this Petition is nothing more than an inappropriate request for an advisory opinion on previously settled areas of Constitutional law.

STATEMENT OF THE CASE

A. Statement of Factual Background

In the evening of June 12, 1996, after two days of detailed negotiations in which the parties intended to create a binding contract to sell the Property, San Paolo and Simon executed a "Letter of Intent" (the "Agreement") whereby Simon and

San Paolo agreed that all essential terms were agreed to and that the parties could then complete a sale of the Property. (Joint Appendix In Lieu of Clerk's Transcript "JA" 1864-1871.) Simon testified that he had waited patiently for almost *two* years to buy the Property and it was perfectly and *uniquely* suited for his business operations and it would generate rental income. (RT 31-34, 1229, 1231-1235; SJA 2424.) Simon was told by the broker that the Agreement was a binding contract and that it was the fastest way to get San Paolo into escrow because of the very short escrow period of about two weeks. (RT 69; SJA 2271-2273.) Contrary to San Paolo's claim, the Agreement did not contain any express statement that it was nonbinding. (SJA 2274-2281.) Simon testified and introduced evidence that the Letter of Intent was originally drafted with an express statement that it was binding but was later *surreptitiously* altered to remove the express statement. (RT 68-70; SJA 2271-2273.)

The Agreement stated it contained the "essential elements of this transaction and that any minor modifications or further instructions shall be identified and reflected in the escrow instructions." (SJA 2274-2281.) Paragraph M of the Agreement stated that "*Seller and Buyer agree to exclusively negotiate upon execution of this letter.*" (SJA 2280.) At trial, San Paolo's officers, Duane King ("King") and William Schack ("Schack"), admitted that they were bound by paragraph "M" and not permitted to negotiate with any buyer other than Simon during the "exclusive period." (RT 355, 486-487, 1434-1435, 1441-1443.) In addition, during the first trial, each party's expert witness, regarding Letters of Intent, testified that parties are bound by exclusive negotiation clauses. (RT 594-596; 804-805.) William Atha ("Atha"), the listing agent for San Paolo and the broker on the sale, acknowledged that the exclusive provision was to prevent the parties from negotiating with anyone else during the exclusive period and that Simon wanted the provision to ward off competing offers. (RT 240-241.)

In reliance on the Agreement and the promises contained therein, Simon hired Donald Mitchell, a lawyer, to whom he paid a nonrefundable retainer of $5,000, and began his efforts to close the transaction. (RT 82-82, 104-105; SJA 2350.) Simon also hired an inspection company and arranged for financing. (RT 93, 106-112; SJA 2293.) Simon testified he was ready, willing, able and eager to close the deal. (RT 65-67, 81-83, 88.) Atha, the broker, also agreed that Simon was committed to closing the transaction. (RT 217, 219 and 228.) Simon had all of the required documents ready to be delivered to King but King, through Atha, expressly told him that he would refuse any delivery. (RT 1252-1253, 1356, 1392-1393.)

The Agreement, as stated above, was agreed to and accepted by King in the evening of June 12, 1996. (RT 1867, 1871.) King was a vice president and specifically authorized to enter into agreements to sell property on behalf of San Paolo. (RT 399-400, 1425-1429.) In fact, both King and Schack, King's supervisor, were officers of San Paolo, with binding authority. King and Schack were authorized to execute in the name of the company all documents as may be required to sell real estate owned by the company. (RT 399-400, 1425-1427, 1428-1429, 1602-1608.) Further, Simon introduced evidence which established that neither officer was reprimanded for his conduct; instead, each received a bonus. (RT 1467, 1604, 1606, 1609, 1611-1612.)

The following morning, King unilaterally demanded that Simon shorten his due diligence period from the agreed date of the 26th to the 21st. Simon agreed to move the period to the 24th, which was only one business day from San Paolo's date of the 21st (a weekend intervened). When Simon demanded that escrow open, King turned the dispute against Simon by asserting that Simon was refusing to perform and thereafter at approximately 5:00 p.m. on the 13th, rather than continue to resolve this issue to complete the transaction as they were bound to do in good faith, King terminated the deal. (RT 1257-1258.)

At the time of these events, San Paolo's agent, Atha, wrote that San Paolo's position was unreasonable. (RT 1345-1347.) He stated as follows:

> [I]t seems that the bank's position of requiring funding no later than the 21st is unreasonable. Buyer has moved forward in "good and, better faith".

(RT 1346-1347.) The evidence established that San Paolo had no valid reason to insist that the deposit be released on the 21st, rather than on the 26th. For reasons which became clear later, King never even tried to get approval of the 24th.

Further, notwithstanding that escrow was to open only hours later, King and Schack conceded San Paolo never prepared any memoranda seeking approval of Simon's transaction from their New York office as they were required to do by the Agreement and as was their custom and practice. The approval documentation was called an "OREO Offer Sheet" and "Credit Memorandum." The evidence established that New York approval of the transaction in writing was never sought. (RT 397-398, 1455-1456, 1461-1462, 1605-1609 and 1614; SJA 2275.)

King's motivation for his unreasonable conduct was explained at trial. The evidence demonstrated that, during the exclusive negotiation period, San Paolo continued to negotiate the sale of Property with another buyer, 816 Partners, L.L.C. ("816 Partners") who were represented by Robert deVogelaere ("deVogelaere"), a broker and a managing member of 816 Partners. (RT 523-525, 534.)

The evidence demonstrated that San Paolo was obviously using Simon as a shill in order to get 816 Partners to the table with a better or firm offer. On June 12th, 816 Partners prepared a Standard Offer. On June 13th, it was signed by King on behalf of San Paolo. King signed it before he had even terminated

Simon's rights to be exclusively negotiating to buy the Property. (JA 1901-1916.) Thereafter, King began his renegotiation with Simon in order to discourage him from attempting to close the deal, and at approximately 5:00 p.m. on June 13, 1996, he terminated the Agreement. (RT 102, 364-367, 1254, 1263-1264, 1267-1268, 1344-1347, 1459-1461, 1616; SJA 2315-2316.)

After Simon filed suit on June 21, and recorded a lis pendens, San Paolo immediately filed a motion to expunge. San Paolo's counsel then drafted several declarations for use at the hearing. Concerned about the exclusive negotiation provision, both King's and deVogelaere's declaration admitted to the enforceability of the exclusivity provision but *fraudulently* stated that it was not violated.

deVogelaere's declaration stated that, because King *had advised* him that he was exclusively negotiating with Simon, they could not discuss the sale of the Property. deVogelaere stated, under oath, that he did not call King until June 14, after the deal was terminated. The declaration of deVogelaere also stated that his negotiations with San Paolo did not take place until the late afternoon of June 14. (RT 538-542, 568-569, 1558-1559.) As explained below, this declaration was intentionally false.

King's declaration stated that they neither met nor communicated with each other during the exclusive period. (RT 373-375, 464-465, 538-542, 1436-1438, 1512-1513, 1558-1559.) King stated that he first met with deVogelaere on June 14, 1996 when they signed their agreement. (*Ibid.*) The trial court relied on these false declarations and expunged the lis pendens. (RT 373-375, 464-465, 538-542, 1271-1272, 1435-1438, 1512-1513, 1558-1559.) As explained below, this declaration was also intentionally false.

At trial, San Paolo's scam began to unravel. Both King and deVogelaere conceded that their declarations were false.

Simon introduced both King's and deVogelaere's telephone records which documented a multitude of calls between deVogelaere and King immediately prior to the execution of Simon's Agreement and thirteen (13) telephone calls during the exclusive negotiation period. (RT 377-382, 464-465, 534-542, 568-569, 1435-1439, 1508-1509, 1511-1512, 1554-1555.) deVogelaere admitted that he was discussing the acquisition of the Property. (RT 508, 527, 534-542, 568-569, 1550, 1554-1555.) Further, San Paolo could not identify any other transactions being discussed with deVogelaere's company at this time. (RT 488-489, 1620.)

San Paolo also enlisted the assistance of the broker, Atha, to *conceal* King's repudiation of the exclusive negotiation clause. Atha's testimony and notes reflect that he was instructed by King, between 1:30 p.m. and 3:30 p.m., on June 13, 1996, during the exclusive negotiating period, not to advise Simon that King was violating his promise to exclusively negotiate. Atha wrote in his notes:

> Do not tell him — Lionel — that Duane is talking to any other deal in building —

(RT 242, 244-245, 1350, 1352; SJA 2353.)

deVogelaere further testified that his declaration was prepared by San Paolo's counsel after an interview with him. He gave them his best recollection at the time and then simply signed what they drafted without checking to see if they changed his story. (RT 542, 1558-1560.) deVogelaere further admitted, contrary to the declaration, that King never told him that he was bound to exclusively negotiate with Simon and, thus, continued to inquire about buying the Property. deVogelaere also admitted that the date of his meeting with King was falsely stated in his declaration; it took place on June 13, not in the late afternoon of June 14. (RT 538-542, 568-569, 1558-1559.)

During cross-examination, King reluctantly conceded that the statements in his declaration were false. (RT 377-382, 464-465, 1435-1438, 1508-1513.) At the first trial, King testified that he first saw the document during the evening of the *13th* at his home in Malibu where he and deVogelaere supposedly met after Simon's deal was terminated. (The declarations stated they first met in the late afternoon of the *14th*.) (SJA 2323-2330, 2331-2338.)

Although King claims he did not read or go over the proposed contract with deVogelaere that evening, he instructed deVogelaere to alter the date of the *offer* on the contract from June 12 to June 14; the date of acceptance was also altered from June 13 to June 14 (RT 383-386, 392, 529-533, 542, 1444-1446, 1448-1452, 1548-1549; SJA 2323-2330, 2331-2338.) The new dates were conveniently after the "exclusive negotiation" period had terminated. (RT 383-386, 392, 529-533, 542, 1444-1446, 1448-1452, 1548-1549; SJA 2323-2330, 2331-2338.)

Simon further impeached King by showing him the original contract with 816 Partners which suggested that he resigned it at a later time, not immediately as he testified. (A color photocopy was provided to the Court of Appeal as SJA 2408-2415.) An embarrassed King had to change his testimony again. Significantly, the form was originally filled out with an unusual bright purple pen by deVogelaere. (RT 1445-1446; SJA 2323-2330, 2331-2338.) King, however, signed and dated the document twice using two different color pens, one of which was deVogelaere's purple pen. The use of the two different pens suggested several possibilities, including one that he reviewed and signed the document at a later time when he used the second pen. Moreover, an examination of the original counterpart clearly showed that his original signature did in fact go all the way through, thus, contradicting one of his many excuses before and during the trial where he claimed it was resigned because he noticed it did not go through "so he

immediately" resigned and redated it. (SJA 2408-2415.) None of the possibilities conformed with King's several different explanations.

During the second trial, King tried to come up with a better explanation. King stated that he now recalled what had happened. King asserted he actually signed the purchase contract the second time in his car after arriving at deVogelaere's house, not at his dining room table. During recross, King was impeached with his deposition testimony, wherein he stated that he signed the purchase contract both times at his dining room table. He never mentioned in his deposition or at the first trial signing the document in his vehicle. (RT 1443-1452, 1485-1486, 1495-1497 and 1514-1518.) He even had a new excuse for the two pens, claiming that deVogelaere must have left one behind.

Further, the chronology of King's story on the morning of the 14th was not credible. King stated that after he signed the purchase contract at his home in Malibu, he left at approximately 8:00 a.m. to drop it off at deVogelaere's house in Pacific Palisades, California. He then placed the document in deVogelaere's mailbox, and drove to his office in a downtown Los Angeles high-rise where he parked his car in subterranean parking, took an elevator, and then made it up to his office in sufficient time to be logged onto the phone at 8:34 a.m., only 34 minutes later (based on the telephone records). (RT 383-387, 391, 1447-1453, 1456.)[2] Assuming he talked on the telephone first, King then, for the first time, prepared a detailed two page OREO Offer Sheet for this new sale which was then provided to his supervisor, Schack, who then prepared a detailed memorandum regarding the purchase transaction and transmitted it to New York, along with the OREO offer sheet,

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2. deVogelaere testified that it took him approximately 45 minutes to one and one half hours to travel by car from his home to King's office in downtown Los Angeles, let alone traveling from Malibu to the Palisades and then to downtown. (RT 527, 1546.)

all by 9:15 a.m. (based on the time stamps on the fax headers). (RT 383-387, 391, 495-496, 1447-1457, 1620-1623.) All of this took less than one hour and 15 minutes.

King, however, made another huge mistake. His computer had automatically dated the OREO Offer Sheet for June 13, 1996, thereby establishing when it was prepared (or worse, King typed the date himself).

Escrow records for the 816 Partners' sale were also introduced into evidence. These records revealed that "extra money" was placed into escrow, beyond the proceeds necessary for the actual sale. The only version of the escrow closing statement produced to Simon reflected that $69,248.38 was overpaid into escrow by the buyer's lender. (SJA 2351.) A letter to the escrow company, prepared by San Paolo's attorneys, discussed apparently a different version of the closing statement where as much as $95,000 was overpaid into escrow by the buyer. (RT 1462-1464.) No evidence was introduced to explain the reason why counsel wrote the letter or why the irregularity existed, except that the "extra money" supposedly went back to the buyer. deVogelaere, who at least initially received the money, testified that having the extra money in escrow was indeed "very uncommon." (RT 1586.)

San Paolo's tangled web of deception did not end, however, when 816 Partners entered escrow on June 14. Three days later, on Monday, June 17, 1996, King, fearing that Simon might file suit to block the sale, instructed Atha to renew their negotiations with Simon. Atha claimed that he did not know about the 816 Partners' sale so he dutifully complied. This instruction came three days after escrow for the sale to deVogelaere had opened! Atha was instructed to offer Simon $5,000 cash to induce Simon to perform his due diligence, and concede that the release date for the deposit would now be the 26th — six days after escrow was scheduled to close with 816 Partners.

(Interestingly, on the 13th, only four days earlier, the 26th was unequivocally unacceptable because there would not have been enough time to close by June 28, 1996. Now, with four less days, there would be.) Atha called Simon several times during that week, providing Simon with updates on King's efforts to get approval for their new deal from New York and Italy, where the parent company was located. San Paolo's transparent intent was to forestall Simon from filing suit, and blocking the sale of the Property, which was originally scheduled to close on June 20. (RT 227, 249-256, 1344-1346, 1353-1356, 1388-1389, 1392-1393; SJA 2323-2330.) Simon, now sensing that another sale was about to close, and that he was being defrauded, filed suit on June 21, 1996. He also recorded a lis pendens temporarily blocking the sale.

Simon testified that, as a result of the misconduct of San Paolo, he was deprived of this very unique five-story property that was specially situated and perfect for his business of selling paper products and printing to local offices. Simon testified he intended to use only a portion of the building to house his own business. The remainder would be leased to commercial tenants. (RT 31-33, 1229, 1231-1235.) The improvements to the upper floors were of high quality. The Property was unique in that it was the only five-story building that would ever be likely to come on the market in the financial district of downtown where the other office buildings are skyscrapers. Indeed, this was truly a once in a lifetime opportunity for a small businessman like Simon.

Simon's expert, David M. Rosenthal, MAI, testified that the market value of the Property was $1.5 million as of June 13, 1996. Simon's offer was for $1.1 million, thus reflecting a *lost profit of $400,000.* (RT 1678, 1703, 1710-1711, 1734; SJA 2274-2281.) San Paolo's appraiser, Mr. Charles Reinagal, stated that the market value of the Property, as of June 13, 1996, was only $1.0 million. However, Reinagal's opinion was substantially undermined by the discovery of a previous market

value appraisal that he did only six months earlier for San Paolo on the same property in connection with San Paolo's judicial foreclosure action which was eventually reported on appeal. *San Paolo U.S. Holding Company, Inc. v. 816 South Figueroa Company*, 62 Cal. App. 4th 1010, 73 Cal. Rptr. 2d 272 (1998). At that time, Reinagal testified that the market value was also $1.5 million. However, for this trial, Reinagal manipulated the evaluation process and dropped the price by 33%. Reinagal lowered the price based primarily on one new comparable, *i.e.*, the very sale to deVogelaere.

As to San Paolo's wealth, their financial statements demonstrated that the company had estimated net assets at liquidation value of approximately $50 million at the first trial. (SJA 2425-2436.) In November 1997, San Paolo transferred over $40 million to its parent company San Paolo Bank. This transfer occurred subsequent to when San Paolo was aware there would be a retrial of the amount of punitive damages. Mr. Wurster, a vice-president of San Paolo, conceded that at the time they made the transfer, they were aware that net worth was a factor to be considered by the jury in assessing punitive damages. (RT 1407-1412.) Further, San Paolo's forensic accounting expert witness Michael Kaplan, C.P.A., testified that prior to the transfer, San Paolo had a net worth at liquidation value of approximately $50 million. (RT 1402-1412; 1889-1893.)

B. Statement of Procedural Background

On June 21, 1996, Simon filed his complaint against San Paolo. The complaint included causes of action for False Promise, Breach of Contract, Specific Performance, and Breach of the Implied Covenant of Good Faith and Fair Dealing. (JA 1-18.) A lis pendens recorded against the Property was expunged on July 23, 1996. The only two causes of action which went to trial were the theories of False Promise and Breach of Contract. The first trial resulted in a verdict in favor of Simon on the claim for false promise, the jury finding that:

(1) San Paolo made a false promise about a material matter to Simon; (2) San Paolo did not intend to perform the promise at the time it was made; (3) San Paolo made the promise with an intent to defraud Simon; (4) At the time San Paolo made the promise, Simon was not aware of its intention not to perform; (5) Simon acted in reliance on the promise; (6) Simon was reasonably justified in relying on the promise; (7) San Paolo's promise caused Simon damage, and that such damage was $5,000; (8) That there was clear and convincing evidence that San Paolo committed malice, oppression or fraud in the conduct on which the jury based its finding of liability for false promise. (JA 615-617.)

The jury also decided that punitive damages should be assessed against San Paolo and determined this figure to be $2,500,000. (JA 618.) The jury found that there was not a binding and enforceable agreement between San Paolo and Simon. (JA 613.)

San Paolo filed its motions for a judgment notwithstanding the verdict and for a new trial, or, in the alternative, for a remittitur on August 21, 1997. (JA 619-776, 1050.) The trial court granted the motion for new trial unless Simon consented to a reduced damage award of $250,000. (JA 1228.) Simon rejected the remittitur and elected to proceed to a second trial. (JA 1269-1271.)

On March 9, 1998, the new trial went forward on the issue of the amount of punitive damages to be awarded. The *second jury to hear this case* returned a verdict of $1,700,000 in punitive damages against San Paolo. (JA 1817-1825.) After the conclusion of the second trial, San Paolo again filed a motion for new trial, or, alternatively for a remittitur, which the trial court denied. (JA 1518-1667; RT 1994-2003.) Under California law, on a motion for new trial, the trial judge conducts a an independent and de novo review of the evidence. (Cal. Code Civ. Proc. § 657.)

San Paolo's appeal, and Simon's protective cross-appeal followed this ruling. (JA 1829-1834, 1851-1853.) The Court of Appeal affirmed the award of punitive damages in an unpublished opinion which was filed on August 28, 2000. San Paolo filed a petition for rehearing which was denied by the Court of Appeal. San Paolo filed a petition for review to the California Supreme Court, which was denied en banc on December 13, 2000.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari arises from a fact specific determination after two trials, two de novo reviews of the matter by the trial judge after verdicts and separate reviews by the California Court of Appeal and California Supreme Court. The opinion of the California Court of Appeal is an unpublished decision. The purported issues presented raise no issues of national significance and seek to avoid clear pronouncements of California law.

I. CALIFORNIA LAW AND THE HANDLING OF THE PUNITIVE DAMAGE ISSUE IN THIS CASE SATISFY DUE PROCESS CONSIDERATIONS.

California law provides "fair notice" in setting forth the guidelines to determine whether punitive damages should be awarded and whether the award is reasonable. Consistent with this Court's recent decisions regarding due process considerations, California law properly restricts a jury's ability to render unfettered awards. California Civil Code §§ 3294 and 3295, California Book of Approved Jury Instructions, aka "BAJI," the independent post-trial review by the trial judge and appellate review based on a review of the entire record for "passion and prejudice" provide adequate constitutional safeguards against excessiveness.

Under California law, a plaintiff must overcome a full panoply of procedural protections before any punitive damage award is upheld. *See Haslip v. Pacific Mutual Ins. Co.*, 499 U.S. 1, 23 (1991). These protections include but are not limited to demurrers and motions to strike the pleadings on the basis that legally and factually a claim justifying punitive damages has not been pled. Cal. Code Civ. Proc. §§ 430.010 and 436. At trial, a plaintiff is not permitted to comment on or even inquire into a defendant's wealth and the punitive damage issues, until the trial court has been satisfied that a prima facie case has been established by the evidence. Cal. Civ. Code §§ 3294 and 3295. In most cases, and certainly in the subject case, the trial court bifurcates the punitive damage phase from the liability and compensatory damage phase. A plaintiff seeking punitive damages can only get to the second phase if the trier of fact finds by clear and convincing evidence that the conduct upon which the intentional tort has been committed was done through malice, fraud or oppression. Of course, there are also various other intermediary motions that are brought, as were brought in this case, including a motion for non-suit or directed verdict.

If the plaintiff overcomes these procedural hurdles, most of which are directed to the trial judge, then and only then is the plaintiff permitted to present the case for punitives to the jury. At that juncture, the court is required under California law to instruct the jury with an approved jury instruction, which advises the jury of the purpose of punitive damages and the various considerations that must be followed: reprehensibility of the conduct, the ratio of punitive damages to the injury, harm or damage to the plaintiff and that it should have a deterrent effect on the defendant in light of the defendant's financial condition.

If an award is actually rendered, it is promptly subject to the trial judge's independent de novo review. Thereafter, the judgment is often, as in this case, subject to appellate review in which a three judge panel reviews the entire record to determine,

inter alia, whether the award was the result of "passion and prejudice" and therefore excessive as a matter of law. The appellate court can also compare similar criminal penalties and fines. And, finally, the state Supreme Court has the discretion to review the decision.

Here, Simon's case has made it all the way through these procedural safeguards. In every forum, before every trier of fact, the conclusion has been the same after careful deliberation of the evidence, to wit: the amount of punitive damages awarded against San Paolo was appropriate given the reprehensibility of their conduct and their total contempt for the lawful process of the court, the potential and actual harm to Simon and others, and given their financial status. No other amount would have served the essential state interest which is to deter wrongful conduct and set an example for others. Indeed, the California Supreme Court denied review en banc.[3]

It is well settled that factors to be considered in evaluating the propriety of an award of punitive damages in California are the reprehensibility of the defendant's conduct, the relationship to the actual harm suffered by the plaintiff and whether the award will have a deterrent effect in light of the defendant's financial condition. *Gagnon v. Continental Casualty Company*, 211 Cal. App. 3d 1589, 1602, 260 Cal. Rptr. 305 (1989); *Moore v. American United Life Insurance Company* 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (1984). These factors are consistent with this Court's guideposts enunciated *BMW*, *supra*, 517 U.S. at 574.

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3. San Paolo devotes considerable space in their petition to a discussion of a concurring opinion of California Supreme Court Justice Janice Brown in *Lane v. Hughes Aircraft Co.*, 22 Cal. 4th 405, 421-22, 993 P.2d 388 (2000). It should not be overlooked that on the heals of issuing that decision and Justice Brown's concurring opinion, the California Supreme Court denied, en banc, any review of the instant case.

In *BMW*, *supra*, 517 U.S. 559, this Court confirmed that punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition. This Court in *BMW* sets forth the guidelines which are to be used in assessing whether the award comports with due process. These standards are the degree of reprehensibility of the conduct, the disparity between the harm or potential harm suffered and punitive damage award, and the difference between the award and the civil penalties authorized or imposed in similar cases. *Id.* at 575. California's approach is completely consistent with this Court's guideposts.

This Court previously upheld, in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) an award of compensatory damages of $19,000, and punitive damages of $10,000,000, against a challenge that the award was so "grossly excessive" as to violate due process. *Id.* at 462. The Court held that the ratio of 526:1, between punitive damages and compensatory damages, was not so excessive as to justify reversal. *Id.*[4] The *BMW* decision also recognizes that no fixed ratio or mathematical formula determines reasonableness. *BMW*, *supra*, 517 U.S. at 585. California law is in accord.

Awarding punitive damages in fraud cases also furthers California public policy of punishing the defendant and making an example, in order to discourage the defendant and others from perpetrating fraud in the future. *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1258, 1 Cal. Rptr. 2d 301; Cal. Civ. Code §3294, subd. (a). If the award exceeds the amount needed to accomplish that goal, an appellate court can infer that the jury acted out of passion and prejudice.

4. The analysis of the *TXO* decision contradicts reliance of San Paolo on the decision of *Federal Deposit Ins. Corp. v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) for the proposition that one of the factors court's are required to consider is whether the harm suffered is purely economic. Further, *Federal Deposit* stated that when the parties have a contractual relationship, they should protect themselves from harm in the contract. (*Ibid.*) That is not the situation in the present case.

(*Id.* at 1259.) When the award is grossly disproportionate to the statutory objective, a presumption arises that it resulted from passion and prejudice. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389 (1978). To make that determination the courts are guided by the three *Neal* factors which are identified above. *Id.* at 928.

Given these important safeguards against excessive awards, the facts of this case demonstrate that the award was clearly within Constitutional boundaries.

A. Actual Harm

In this case, based on clear California decisional precedent, the appellate court rejected San Paolo's attempt to restrict the harm considered by the jury in order to arbitrarily inflate the ratio to 340 to 1. After conducting its own independent review of the entire record, the appellate court held that the proper measure was the total harm suffered by Simon thereby establishing as a matter of law that the ratio is just over 4 to 1. (Pet. A-31) The evidence proved at trial that Simon lost the Property, which was worth $1.5 million, or $400,000 more than the agreed purchase price. The $1,700,000 award is approximately four times the actual harm sustained and approximately equivalent to the value of the Property. San Paolo ignores this evidence, arguing that the compensatory damages are only $5,000. San Paolo's argument is not based on any realistic assessment of what the second jury considered as the harm. They conveniently ignore that the second jury was not prohibited from considering all harm to Simon as a result of their conduct and that the ratio set forth in the jury instructions was not limited to only compensatory damages, *i.e.*, injury, *harm* or damage. *See* BAJI, 14.72.1 and 14.72.2.

Reported decisions in California have upheld awards of punitive damages where the ratios were 2,000 to 1, much higher than the present case. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d

910, 920, 148 Cal. Rptr. 389 (1978) [**74:1**]; *Finney v. Lockhart*, 35 Cal. 2d 161, 162, 165, 217 P.2d 19 (1950) [**2,000:1**]; *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1166, 74 Cal. Rptr. 2d 510 (1998) [**70:1**]; *Wetherbee v. United Ins. Co. of America*, 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971) [**200:1**]. Thus, there is nothing per se inappropriate in this case about the ratio between punitive damages and the actual harm sustained.

Ordinarily, one who has been fraudulently induced to enter into an unenforceable contract may recover the benefit of the bargain, as well as out-of-pocket expenses. *Lazar v. Superior Court*, 12 Cal. 4th, 631, 638, 49 Cal. Rptr. 2d 377 (1996). However, a defrauded purchaser of real property, who does not succeed in acquiring the property, may recover only his or her out-of-pocket losses, not benefit-of-the-bargain damages. (*Kenly v. Ukegawa*, 16 Cal. App. 4th 49, 54, 19 Cal. Rptr. 771 (1993); Cal. Civ. Code, § 3343.)

That does not mean that Simon did not suffer injury due to the loss of his bargain. Simon agreed to purchase the building for $1,100,000. His expert appraised the building's value as $1,500,000, as had San Paolo's expert before the action was filed. Simon's loss was at least the $400,000 difference between the appraised value and the price at which King falsely promised to sell the building.[5]

Although the compensatory damage award is usually a convenient measure of the injury or damages suffered by a

5. Simon also lost a unique opportunity. Small office buildings rarely come on the market in the location of the subject five-story office building, and Simon found it to be perfect for his paper and printing business, partly because it would enable him to compete better with the large suppliers like Staples, Office Depot, and Xerox. The building itself was also ideal, because it had a finished basement with a large, industrial-size freight elevator, which he found to be perfect for his warehouse. He planned to use the second floor, and lease out the top three floors, which had high quality improvements, making them attractive to potential tenants.

plaintiff, it may or may not reflect the **actual harm** the plaintiff has suffered. *BMW*, *supra*, 517 U.S. 559; *see also Gagnon v. Continental Casualty Co.*, 211 Cal. App. 3d 1598, 1603-04 (1989). "Thus, to meaningfully apply the 'reasonable relation' rule, the trier of fact (and reviewing court) should not focus on some bottom-line amount of an award of compensatory damages but on the nature and degree of the actual harm suffered by the plaintiff . . . ." *Id.* at 1604; *Carr v. Progressive Casualty Ins. Co.*, 152 Cal. App. 3d 881, 892 (1984).[6]

Thus, although the judgment would be limited to an award of only $5,000 in compensatory damages, Simon was permitted to introduce evidence of actual harm sustained, *i.e.*, the differential between the sales price and the fair market value of the Property and the impact of the loss of this building on him, rather than merely the compensatory damages awarded by the first jury. Further, Simon introduced evidence that he was deprived of a building that was uniquely suited to his needs. Even if a monetary value is not placed on such a loss, it is evidence of actual harm which far exceeds in value the compensatory award.

B. Reprehensibility of Conduct of Defendant

San Paolo used Simon to ensure that deVogelaere would close the deal with San Paolo. This was for the apparent purpose of permitting King, and possibly others, to obtain some undisclosed monetary benefit, perhaps from the extra escrow funds. In closing arguments, San Paolo's counsel denied that

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6. Nor does the Due Process Clause of the Fourteenth Amendment require comparison with a fixed ratio based upon the compensatory-damage award. "It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *TXO*, *supra*, 509 U.S. at 460; *BMW*, *supra*, 517 U.S. 559.

his client received a "bribe." (RT 1952-1954.) Simon's counsel never referred to it as a bribe, just unusual extra money.

San Paolo continued to mislead Simon about its willingness to sell Simon the Property in order to forestall interference by Simon with the close of the sale. When that failed, as a result of the prompt filing of this lawsuit and recordation of the lis pendens, San Paolo resorted to perjury. San Paolo filed false declarations of King and deVogelaere denying any communications during the period of exclusive negotiations in order to obtain an order expunging the lis pendens from the Property, thereby preventing Simon from ever obtaining the Property through his specific performance claim. That claim was rendered moot when Simon's Lis Pendens was expunged based on the false declarations and the Property was then sold to 816 Partners, L.L.C. The evidence in the case established that Simon would have purchased the Property if it were not for the fraud of San Paolo. San Paolo continued to subom perjury even throughout the second trial, never once apologizing for what its senior officers did to Simon, or attempt in any manner to offer an explanation as to the false declarations. In the second trial they continued with the same false testimony. The trial judge understood the impact of San Paolo's conduct:

> Let me tell you what I think happened. I think the jury considered Mr. King's conduct [San Paolo's officer] reprehensible . . . In fact, both juries did. And I have come to the conclusion after two jury trials that they thought King was lying . . .
>
> And the witnesses who supported King, I think that the jury believed they lied too. Lying is very powerful in the court if the jury believes that somebody lies.

(RT 1999.)

The appellate court agreed after a review of the whole record, that the evidence demonstrated not a single instance of misconduct as San Paolo would like to believe, but rather:

> King's deceit is not so easily dismissed as an isolated incident. It was continuous and intricate. After this action was filed, King **filed two false declarations**
>
> . . . .
>
> However, King's false testimony was more than litigation misconduct. It showed how he manipulated the parties and documents at the time of the events in mid-June 1996 in order to support his false claim that he complied with the terms of the letter of intent, and its claim that it was Simon who failed to perform. King's deception at trial showed how false he was prior to trial, and thus, how **reprehensible** his conduct was.

(Emphasis added.) (Pet. A-33-34.) Numerous cases hold that the more reprehensible the act, the greater the amount of punitive damages is justified. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389 (1978); *Moore v. American United Life Ins. Co.*, *supra*, at 637, 640; *Vallbona v. Springer*, 43 Cal. App. 4th 1525, 1536, 51 Cal. Rptr. 2d 311 (1996). Calculation of punitive damages "involves . . . a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendant." *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 390, 202 Cal. Rptr. 204 (1984). *Accord Walker v. Signal Companies, Inc.*, 84 Cal. App. 3d 982, 998, 149 Cal. Rptr. 119 (1978). In this case, San Paolo was caught cheating and lying. Thus, its conduct was considered despicable. San Paolo was appropriately punished for its unethical business practices. As Justice Kennedy aptly pointed out in his concurring opinion in TXO:

> . . . it was rational for the jury to place great weight on the evidence of TXO's deliberate, wrongful conduct in determining that a substantial award was required in order to serve the goals of punishment and deterrence. I confess to feeling a certain degree of disquiet in affirming this award, but the record, when viewed as a whole, makes it probable that the jury's verdict was motivated by a legitimate concern for punishing and deterring TXO, rather than a bias, passion, or prejudice. There was ample evidence of willful and malicious conduct by TXO in this case . . .

TXO, supra, 509 U.S. at 469.

Here, the evidence demonstrated a deliberate and calculated plan to defraud Simon and to prevent his acquisition of the building. Additional money was located in escrow and San Paolo tried in vain to deny it was a kickback or a bribe. San Paolo's senior officers falsified documents, lied i deposition and under oath at trial, not once — but on several occasions. They also filed declarations which were false and engaged in conduct that was considered in bad faith and unethical. Even after the entire scheme was disclosed by Simon, San Paolo continued to condone the conduct by moving to expunge Simon's lis pendens, thereby depriving Simon of a unique building in the heart of downtown Los Angeles, that he had closely followed and was led to believe he could buy for years while San Paolo completed its foreclosure. The senior officers guilty of this misconduct were not reprimanded or criticized but rather were given sizable bonuses for their "good" deeds.

C. Financial Condition

In order to accomplish the statutory goal of punishment and deterrence, a larger amount of punitive damages is

appropriate in the case of a wealthier defendant; the award must be large enough so that the defendant will not be able to absorb it without some discomfort. *Vallbona v. Springer*, 43 Cal. App. 4th 1525, 1539-41, 51 Cal. Rptr. 2d 311 (1996) (award of nearly 25% of defendant's net worth was not excessive). Here, the jury properly considered evidence of the current wealth of San Paolo and the $40 million in cash that it surreptitiously transferred to its parent — affiliate, San Paolo Bank. The jury appropriately considered the timing of the transfer as a further factor in determining the appropriate amount to award for the purpose of deterring San Paolo's future conduct. *See Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989) (Financial position of defendant is an appropriate factor for consideration.) (Cited with approval in *TXO, supra*, 509 U.S. at 462 & n.28 (plurality opinion); *Id.* at 469 (Kennedy, J. concurring in part and concurring in judgment); *Haslip*, 499 U.S. at 21-22; *Browning-Ferris Industries of VT., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part, dissenting in part).

D. Comparison to Criminal Fines and Other Sanctions

The final factor to be considered pursuant to *BMW* would be civil or criminal penalties for comparable misconduct. (*BMW v. Gore, supra*, at 1603.) This factor was appropriately addressed at the post award level. Here, perjury, as was proved at trial, calls for a sentence of two, three or four years, thus evidencing the serious nature of the misconduct involved. (Cal. Penal Code § 126.) Further, civil penalties for Unfair Competition, under California Business and Professions Code §§ 17200 and 17203, would include return of everything of value misappropriated by the wrongdoer. In this case, that would involve return of a property appraised at $1,500,000. Thus, criminal and civil penalties for San Paolo's misconduct are consistent with the award of punitive damages of $1,700,000.

III. SAN PAOLO'S ONE SIDED VERSION OF THE FACTS IS MISLEADING AND MAKES IT IMPOSSIBLE TO DETERMINE HOW OR IN WHAT MANNER THIS CASE RENDERS ANY LAW UNSETTLED OR OF NATIONAL IMPORTANCE.

The petition in this unremarkable appeal by the unsuccessful defendant in a real estate litigation matter does not assert any unsettled, important questions of law of national importance and does not present a necessity to secure uniformity of decision. Indeed, San Paolo makes no effort to demonstrate how this case affects any other tribunal deciding punitive damages or how the California state common law procedures for awarding punitive damages or evaluating them on appeal is inconsistent with another state.

San Paolo argues that a new standard of de novo appellate review should be established, yet fails to offer to this Court the complete factual record, as they failed to do in the state court of appeal. San Paolo's failure to provide the Court with the full record, justifies a denial because it demonstrates that San Paolo has artfully chosen which facts to discuss in an intentionally misleading way. Moreover, the State Court of Appeal did not consider San Paolo's current request to impose de novo review, although that is essentially what the appellate court did by reviewing the entire record. It appears that San Paolo's request is simply to create the appearance of "*Cooper*-like" qualities in order to gain this Court's attention. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035 (review granted.)

Thus, San Paolo has not adequately established compliance with any of the written considerations governing Supreme Court review as specified in Supreme Court Rule 10(b) or 10(c). These sections provide that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeal" and that "a state court . . . has decided an

important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." San Paolo has merely repeated constitutional buzzwords without substance. San Paolo fails to adequately describe or explain how or in what manner the conflict exists or how the state appellate court's decision conflicts with this Court's precedent. There is literally no showing of any practical and real significance to the alleged conflicts. Simon asserts that these hollow pronouncements by San Paolo justify a denial of review.

This is merely a case brought by a disgruntled litigant in a fact specific determination that affects only the litigants to this action. San Paolo's professed desire to settle important procedural issues of law is disingenuous. Indeed if, as San Paolo asserts, this Court's review of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035, will address the issues raised by San Paolo, then this case is not necessary for that review or to assist the legal community. Furthermore, the instant case was twice reviewed on a de novo basis. The first time was on liability and damages. The second was solely on damages. Furthermore, the issue of a new or different form of de novo review on appeal was not addressed by or to the state appellate court. (*See, e.g., Illinois v. Gates* 462 U.S. 213 (1983) (State Courts should be given opportunity to substantively address the issue.)

The Petition raises issues adequately addressed in this Court's decision in *BMW, supra*, 517 U.S. 559. It offers nothing new, but merely the same issues as to the considerations required by states to comply with due process. San Paolo has not explained why that decision does not address the concerns raised in the Petition. San Paolo has not, and indeed cannot, show where additional judicial intervention is needed.

IV. SAN PAOLO'S CONSTITUTIONAL VAGUENESS ARGUMENT WAS REJECTED BY THE STATE APPELLATE COURT BECAUSE IT WAS INADEQUATELY RAISED AND IS NOT PROPERLY PRESERVED FOR SUPREME COURT REVIEW.

San Paolo's contention that California law is unconstitutionally vague (San Paolo's Reasons for Granting Petition "C") was inadequately raised at the appellate level as found by the California Court of Appeal. (Pet. A-17; 38-39.) The Court of Appeal rejected this argument finding it was not properly presented. As such it was not properly "passed upon" or "specially set up" for review. 11 U.S.C. § 1157. *See also Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308 (1903) ("[T]he right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way"); *Webb v. Webb*, 451 U.S. 493, 495 (1981) (petitioner failed properly to raise or preserve claim in state courts).

San Paolo expresses the often used incantation by a losing party that a particular state standard is "Constitutionally vague"; however, San Paolo, as it did at the appellate level, makes no effort to address how or in what manner California law is vague. In *Neibel v. TransWorld Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997), it is stated that consistent with principles of due process, California Civil Code § 3294 provides "fair notice" that fraud can warrant an award of punitive damages. Numerous California decisions have also held that California Civil Code § 3294 is Constitutional. *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n.2, 185 Cal. Rptr. 654 (1982); *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1256-59, 1 Cal. Rptr. 2d 301 (1991). Thus, it is unlikely that California's statutory scheme for awarding punitive damages and all of the other procedural hurdles, outline above, can be considered constitutionally vague. It is specifically designed to provide fair notice to the litigant of the potential for an award.

V. THE OPINION SETS NO PRECEDENT AND AFFECTS ONLY SIMON AND SAN PAOLO.

The opinion by the California Court of Appeal has no precedential value and affects only Simon and San Paolo. The California Court of Appeal's Opinion was not published. Subject to limited exceptions (none of which is even arguably applicable here), unpublished opinions of a Court of Appeal cannot be cited or relied on by a court or a party in any other action or proceedings. Cal. Rules of Court, Rule 977(a).

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 00-1457

In the Supreme Court

OF THE

United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,
Petitioner,

VS.

LIONEL SIMON, dba LIBERTY PAPER COMPANY,
Respondent.

On Petition For a Writ of Certiorari to the Court of Appeal of California, Second Appellate District, Division Four

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In support of its Petition for a Writ of Certiorari (the "Petition"), Petitioner SAN PAOLO U.S. HOLDING COMPANY, INC. ("SAN PAOLO"), hereby responds to the Brief in Opposition (the "Opposition Brief") filed by Respondent LIONEL SIMON, dba LIBERTY PAPER COMPANY ("SIMON")[1], as follows:

INTRODUCTION

In the Petition, SAN PAOLO presents three questions for this Court's review, as follows:

(i) Whether an award of punitive damages which is 340 times greater than the attendant award of compensatory damages ($1,700,000.00; $5,000.00) is violative of a defendant's right to due process under the Fourteenth Amendment to the United States Constitution, especially where the conduct involves a single commercial transaction and the harm suffered is purely economic;

(ii) Whether the standard of review on a challenge to the constitutionality of a punitive damage award is (a) "independent and de novo," or (b) only an "abuse of discretion"; and

(iii) In determining the reasonableness of the relationship between an award of punitive damages and the plaintiff's actual harm, whether it is proper to consider claims for compensatory damages which have previously been rejected.

In his Opposition Brief, SIMON misses the entire focus of the Petition by failing to address these critical issues of nationwide importance. Instead, SIMON devotes virtually one half of the Opposition Brief to an inflammatory and

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[1] While, according to this Court's Docket, SIMON filed his Opposition Brief on April 19, 2001, it was served such that it was not received by counsel for SAN PAOLO until four days later, on April 23, 2001.

inaccurate description of the facts of this case. The Petition, in contrast, is not based upon the facts of this case, but rather substantial questions of law of paramount public interest and concerns which have not yet been addressed by this Court. SIMON, however, focuses on his own interpretation of the facts in an attempt to divert this Court's attention from issues of wide-ranging importance to all civil litigants and courts throughout the Nation.

ARGUMENT

In the Opposition Brief, SIMON fails to address the merits of the issues raised in the Petition and instead relies on various boilerplate, conclusory arguments in an effort to dilute these important issues. For example, SIMON asserts that the Opinion of the California Court of Appeal is "unpublished." This fact only highlights the urgent need for guidance from this Court regarding the standard of appellate review of the constitutional excessiveness of punitive damage awards. Beyond the plethora of published decisions addressed in the Petition, there are undoubtedly even more decisions regularly issued by various state courts throughout this land on this issue, all applying conflicting deferential standards of review when analyzing issues of constitutional significance. Moreover, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, United States Supreme Court Case No. 99-2035 *("Cooper Industries")*, the question presented and ultimately accepted by this Court for review was encompassed in the unpublished portion of that case.[2]

SIMON summarily dismisses the issues of federal constitutional concern raised in the Petition, claiming that this appeal is "unremarkable" and involves (as does every case)

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[2]This case was argued before this Court on February 26, 2001, and remains pending.

"a fact specific determination." (See Opposition Brief, pp. 25-26.) SIMON also fails to address in any way the authorities discussed by SAN PAOLO. These authorities illustrate the problems presented by the use of divergent appellate standards of review by state courts throughout this country when conducting a constitutional inquiry into claims of grossly excessive punitive damage awards. (See Petition, pp. 11-19.)

SIMON further fails to dispute the fact that the Petition raises an issue under the Fourteenth Amendment of the United States Constitution which is strikingly similar to the issue under the Due Process Clause of the Fifth Amendment currently under consideration in *Cooper Industries:* whether the standard of review of a federal trial court's ruling on a challenge to the constitutionality of a punitive damage award is abuse of discretion or de novo. In both *Cooper Industries* and the case at bench, the appellate court applied a deferential standard of review in determining that the trial court had not abused its discretion in refusing to reduce a punitive damage award. By accepting the Petition filed by *Cooper Industries,* this Court acknowledged the nationwide significance of this issue, which SIMON simply cannot dispute.

SIMON attempts to avoid the fact that the California Court of Appeal used a substantial evidence (deferential) standard of review and not the de novo standard clearly requested by SAN PAOLO in its Opening Brief by repeatedly claiming (without any support) that the Court of Appeal upheld the judgment after it had reviewed "the entire record." (App.[3], A-31, A-35-A-36; Appellant's Opening Brief, p. 14; Opposition Brief, pp. 2, 15, 18.) SIMON'S repeated incantation, however, only begs the question: according to what standard was all or any portion of the record

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[3]"App." refers to the Appendix to the Petition.

reviewed? Further, the Court of Appeal's own language contradicts SIMON'S argument.

Indeed, *the Court of Appeal itself acknowledged its deference* to the findings of the jury, advising that its review "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusions reached by the jury." (App., A-31, A-35-A-36.) SIMON also fails to acknowledge that the Court of Appeal deferentially reviewed all of the evidence "in the light most favorable to Simon, as the prevailing party," gave "Simon the benefit of every reasonable inference," and resolved "conflicts in support of the verdict." (App., A-19-A-20.) In the Opposition Brief, SIMON fails to confront the fact that the Court of Appeal flatly refused to engage in an independent, de novo review of the constitutionality of the excessive award of punitive damages herein.

SIMON also attempts to divert this Court's attention by repeatedly speculating that the *trial court* must have engaged in a de novo review of the jury's award, because such review is required on a motion for new trial under California Code of Civil Procedure section 657. The question presented to this Court is not the standard which may or may not be employed by trial courts when reviewing the propriety of punitive damages awards but, instead, is the standard to be applied by appellate courts when reviewing trial court rulings on constitutional challenges to excessive punitive damage awards. SIMON'S attempt to so shift the focus of the Petition is to no avail.

Moreover, the truth is that no such standard is set forth in this statute. Instead, Section 657 provides a highly deferential standard, as follows:

> A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or

> other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.
>
> (Cal. Code Civ. Proc., § 657.)[4]

In ruling upon SAN PAOLO'S Motion for New Trial, or Alternatively for Remittitur of Excessive Damages, following the second jury trial (limited to the amount of punitive damages to be awarded)[5] the trial court afforded SAN PAOLO only perfunctory treatment of its challenge to the excessiveness of the award under the standards set forth in *BMW of North America v. Gore,* 517 U.S. 559 (1998) and *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, finding that an award of punitive damages "boils down to about the same sort of analysis that the jury gives to emotional distress damages. It's not done with any particular precision. And the cases have not required that it be done with particular precision." (App. Vol. VII, pp. 1826-1828; R.T., p. 1997, l. 12 - p. 1998. l. 12.) Accordingly, the trial court patently did not apply any standard even approaching "independent" or "de novo" in reviewing the constitutionality of the punitive damages award.

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[4]Notably, a trial court's order on a motion for a new trial is reviewed only for "manifest and unmistakable abuse of discretion." *Miller v. National American Life Ins. Co.,* 54 Cal.App.3d 331, 345 (1976). A true and correct copy of California Code of Civil Procedure section 657 is appended hereto for this Court's reference. (Reply App., *infra,* A-1.)

[5]SIMON glosses over the fact that SAN PAOLO prevailed on its first Motion for New Trial following the punitive damage award of $2.5 million by the first jury, which the trial court remitted to $250,000.00. The second jury trial on the limited issue of the amount of punitive damages to be awarded to SIMON was necessitated by his rejection of the trial court's remittitur.

In his Opposition Brief, SIMON employs a novel interpretation of *BMW*. This case is universally cited for the proposition that punitive damages must bear some reasonable relationship to the actual harm suffered. See, e.g., *Continental Trend Resources v. OXY USA,* 101 F.3d 634, 639 (10th Cir. 1996); *Ace v. Aetna Life Ins. Co.* 139 F.3d 1241, 1248-1249 (9th Cir. 1998), *cert. denied,* 525 U.S. 930 (1998). In contrast, SIMON cites *BMW* for the proposition that large punitive damage awards can be made in virtually all circumstances. (Opposition Brief, pp. 19-20.) This assertion is legally incorrect.

SIMON also discusses his expert, David M. Rosenthal, who testified that SIMON had suffered a loss of profit of $400,000.00 due to his inability to purchase the subject office building. (Opposition Brief, pp. 11, 18, 19.) SIMON fails to address the fact that the first jury expressly rejected this claim and refused to award any damages associated therewith, including this alleged lost benefit of the bargain. It is this rejection which is the focus of the third question presented by SAN PAOLO'S Petition: whether this "loss" can be considered in calculating an award of punitive damages when the prior factfinder has determined that no such loss occurred.

CONCLUSION

In light of SIMON'S inability to squarely face the questions presented by the Petition and the amply supported reasons submitted by SAN PAOLO for granting the Petition, SAN PAOLO respectfully requests that this Honorable Court grant its Petition for a Writ of Certiorari to provide litigants with guidance on these sharply focused issues of nationwide interest and application.

At a minimum, SAN PAOLO respectfully requests that this Honorable Court defer consideration of the Petition pending the announcement of its decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, Case No. 99-2035. Should this Court reverse the (unpublished) decision of the United States Court of Appeals for the Ninth Circuit in that case, SAN PAOLO respectfully requests that the Court summarily grant certiorari herein, reverse the judgment of the California Court of Appeal, Second Appellate District, Division Four, and remand the case for reconsideration in light of the standards set forth in its forthcoming decision.

Date: May 10, 2001 Respectfully submitted,

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APPENDIX A-1

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 657

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive or inadequate damages.

6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons

specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.